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June 20, 2017

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Bureau of Industry and Security
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 1093
Washington, DC 20230
By Email: Aluminum232@bis.doc.gov

PUBLIC VERSION

**Re: Section 232 National Security Investigation of Aluminum Imports –
Submission of Written Comments on Behalf of RUSAL**

Dear Mr. Botwin:

Pursuant to the Notice of Request for Public Comments and Public Hearing on the Section 232 National Security Investigation of Imports of Aluminum, published on May 9, 2017 (82 Fed. Reg. 21509), please find attached the comments of Rusal America Corp. and its parent company United Company Rusal Plc of Russia (collectively “RUSAL”). RUSAL is a Russian producer and exporter of aluminum, and therefore an interested party in this proceeding.

As requested by subsequent notice, we are filing these comments by June 20, 2017 so that the U.S. Department of Commerce staff has access to them prior to the hearing. RUSAL reserves the right to file supplemental comments after the hearing, by June 23, 2017. As requested in the notice, these comments address the criteria listed in § 705.4 of the national security regulations with regard to aluminum imports globally and from Russia.

We have indicated with brackets any non-confidential information, and we have included a public summary as appropriate. Pursuant to 15 C.F.R. § 705.6 (a), we hereby request that the Department exempt certain information, clearly identified in brackets in the comments submitted under cover of this letter from public disclosure. The business confidential treatment is requested because the data include, inter alia, business trade secrets, commercial or financial information and certain other information, the release of which would cause competitive harm to the submitter.



If you have any questions about this request, please do not hesitate to contact me.

Respectfully submitted,

Scott J. States

Scott States

President, Rusal America Corp.

*On behalf of Rusal America Corp. and United
Company Rusal Plc*

PUBLIC VERSION

BEFORE THE
U.S. DEPARTMENT OF COMMERCE
WASHINGTON, D.C.

**RUSAL COMMENTS ON
SECTION 232 NATIONAL SECURITY INVESTIGATION
OF IMPORTS OF ALUMINUM**

June 20, 2017

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EXECUTIVE SUMMARY

United Company Rusal Plc (“Rusal”) hereby submits its written comments on the Section 232 National Security Investigation of Aluminum Imports. Rusal is a vertically integrated aluminum producer with core operations in Russia. It is among the largest producers of primary aluminum and alloys in the world, and is a publicly listed company on the Hong Kong Exchange. Rusal therefore welcomes this opportunity to present important information demonstrating that imports of aluminum do not threaten U.S. national security.

This case raises fundamental questions about the global aluminum industry and global trade in aluminum products. The potential impact of this case is very broad. Nevertheless, this case involves a very narrow issue concerning the impact of imported aluminum on *national security*. That should be the focus.

Specifically, the question presented is whether aluminum imports “threaten to impair” national security. The answer is clear: aluminum imports do *not* threaten national security. This is true for imports from all sources, and it is particularly true for imported aluminum from Russia. Indeed, the only aluminum that is critical to national security is specialty “high purity” aluminum, a small amount of which is consumed by the defense industry for specialty applications, and all of which is supplied to the defense industry from domestic sources.

Defense needs for other types of aluminum are also minimal and easily supplied by domestic suppliers. The defense industry consumes no more than 1% or 2% of all aluminum produced in the United States, including both direct and indirect consumption. The domestic industry can – and does – easily supply all such aluminum required by the defense industry, and imports have no impact on this whatsoever. Defense industry needs have remained steady and are projected to decrease over the next few years. There simply is no credible “threat” to national security posed by any aluminum imports, and certainly no threat from Russia.

The U.S. Department of Commerce (“Commerce”) may only determine that imports threaten national security if either (1) the United States is so captive to imports from unreliable sources that it is vulnerable to critical military supply disruptions; or (2) imports have undermined the “viability” of the domestic industry such that it is fundamentally incapable of supplying the military and defense industry’s needs. These are very high standards and they are certainly not met in this case.

As demonstrated in this submission, imports of aluminum are not “excessive.” Imports of *all* aluminum products amount to less than 10% of total domestic U.S. aluminum output. Importantly, the vast majority of any such imports consist of “unwrought” aluminum that is needed and consumed by downstream U.S. producers of semi-finished and finished aluminum. Very little downstream “semi-finished” or finished aluminum products are imported. Moreover, imports are sourced from many different reliable suppliers, including Canada, Russia, Mexico, Germany, the United Arab Emirates (“UAE”), Argentina, South Africa, Brazil, and many others.

As we also document in this submission, most sectors of the U.S. aluminum industry – including the important downstream producers of “semi-finished” aluminum – are healthy and profitable, and fully capable of supplying all U.S. national security requirements now and in the future. Thus, there is no credible threat whatsoever that these small volumes of imported aluminum can somehow undermine the “viability” of the domestic aluminum industry to continue supplying the very small quantities of aluminum needed for national security purposes.

Importantly, this case is *not* about whether aluminum imports are generally harming the U.S. aluminum industry. That question is reserved for trade remedy cases such as antidumping and countervailing duty (“AD/CVD”) cases. In this regard, the domestic primary aluminum industry last sought AD/CVD relief in 1981 and 1973. In both instances, however, the domestic

primary aluminum industry was found not to be injured or threatened by aluminum imports. Since that time, other segments of the domestic aluminum industry have received AD/CVD protection from unfairly traded imports, including very high AD/CVD duties against a broad range of aluminum “extrusions” and other aluminum products such as foil from China.

These AD/CVD duties have remedied any problems facing the U.S. aluminum industry from illegally subsidized Chinese imports from state-owned producers, which have flooded the U.S. and the global marketplace the past few years. Indeed, illegal Chinese aluminum subsidies have caused massive Chinese overcapacity. Such subsidized and massive excess capacity has resulted in a flood of low-priced exports to the U.S. and all over the world at artificially low prices. This in turn lowers prices and profits for everyone. In fact, U.S. imports of certain Chinese aluminum products increased by 183% from 2012 through 2015.

By comparison, Rusal’s mills are not state-owned or subsidized. Rusal’s mills compete fairly based on free-market principles. Rusal has been – and continues to be – a market economy participant that plays by the rules of free and fair competition. Rusal’s mills are modern, efficient, and environmentally conscious. Rusal does not have excess capacity and it has a vibrant home market and other export markets to which it supplies most of its aluminum.

Importantly, the trade remedies against China are working. As noted above, many sectors of the domestic U.S. aluminum industry are profitable or returning to profitability, and aluminum imports do not otherwise negatively impact the aluminum industry. This is particularly true for the downstream segments of the aluminum industry, including producers of semi-finished and finished aluminum. Indeed, imported aluminum fills a critical “gap” in overall U.S. demand for aluminum. There is simply no way that U.S. producers of primary aluminum can satisfy total demand in the U.S. for all aluminum products.

In fact, total domestic production of primary aluminum meets only about 15% of total U.S. consumption of primary aluminum. This includes the large amount of primary aluminum required by downstream U.S. producers of semi-finished aluminum. Without imports, there would be a massive shortage of aluminum raw materials required in the U.S. market by all sectors of the aluminum industry. In addition, demand for such primary aluminum by U.S. downstream producers has continued to grow each year, further widening the gap between domestic supply and demand of primary aluminum. This constant demand growth for primary aluminum by downstream producers of semi-finished aluminum requires additional input of primary aluminum, which the domestic industry simply cannot provide. Fortunately, imports help fill this gap.

Any problems currently faced by the domestic aluminum industry are actually caused by other factors, including outdated and inefficient smelting operations, low prices on aluminum, and high labor energy costs for U.S. smelters. These are fundamental structural problems in the industry that cannot be fixed by import restrictions. Moreover, only U.S. smelters face these structural problems. Yet, smelters account for a very small portion of overall aluminum production, as they produce less than 20% of all aluminum needed by downstream the U.S. producers each year. The vast majority of U.S. aluminum producers – including most downstream producers of semi-finished aluminum – are healthy, profitable, and growing. This is important because U.S. downstream producers of semi-finished aluminum produce approximately *ten times more aluminum products than U.S. production of primary aluminum*.

In fact, additional import restrictions would have an adverse impact on the U.S. economy by increasing aluminum prices, particularly for the primary aluminum needed to grow the U.S. economy. This in turn would cost U.S. jobs and weaken the U.S. economy. This is critical given

that downstream production accounts for more than 74% of all U.S. aluminum jobs. Import restrictions would also deprive U.S. downstream suppliers of critical raw materials they need (*i.e.*, unwrought aluminum) to produce semi-finished aluminum actually supplied to the defense industry. This would actually weaken national security, not strengthen it.

In fact, import tariffs or similar restrictions on imported aluminum would be highly adverse, tightening supply and needlessly increasing costs. Recent experience in the EU with tariffs on imported aluminum has proven this to be true, as import tariffs on aluminum simply increased the cost of aluminum. Some studies suggest that any such tariff on imported aluminum would likely be passed on to downstream producers and, ultimately, to consumers. This means a 30% tariff could increase aluminum prices by an equal amount.

For these reasons, there should be no relief. Aluminum imports do not threaten national security. The defense industry consumes only a very small amount of aluminum that is actually critical to its needs, most of which is specialty “high purity” aluminum. It also consumes a small amount of other types of semi-finished aluminum. Any such aluminum can easily be provided from domestic sources. Any restrictions to aluminum imports – whether quotas or tariffs – would do more harm than good. This is particularly true for downstream producers of semi-finished aluminum, who rely heavily on imports. Moreover, imports of primary aluminum have also greatly contributed to an increase in energy efficiency and to a cleaner U.S. environment.

If Commerce does recommend relief, it should do so as narrowly as possible. Any relief should be limited only to Chinese imports that circumvent other trade remedies currently in force and that are subsidized and controlled by the Chinese Government. Any import restrictions should be limited only to those specific products affecting national security. There should also

be a liberal exclusion process to ensure that any relief provided does not capture imports that are not the source of any problems, and that are not otherwise available from domestic producers.

Furthermore, relief should not be granted against Rusal or other fair traders. Rusal is not the cause of any problems to the domestic aluminum industry. Rusal does not compete primarily with U.S. producers for market share, but with offshore suppliers and traders. Rusal is not state-subsidized. It has limited its capacity focused on growing its domestic market. As such, Rusal will not significantly increase its import volume into the U.S.

Moreover, Rusal's imports do not have any adverse impact on U.S. national security or the U.S. economy. Rusal does not export "high purity" aluminum. Rusal exports moderate and steady volumes of commercial grade primary aluminum to the U.S. that are needed by downstream U.S. producers of semi-finished aluminum. Rusal has long-term relationships and supply arrangements with its U.S. customers.

Rusal is a responsible participant in the U.S. market. Many of Rusal's U.S. customers are part of global enterprises for which Rusal's U.S. business forms part of a global strategic relationship with these companies. Thus, while not primarily aimed at the U.S. market, Rusal's imports are important because downstream U.S. producers need them as raw materials for their U.S.-based further manufacturing operations. This in turn fuels additional demand for imports of primary aluminum from Rusal.

Rusal's production facilities are designed to meet customers' specifications and requirements. Rusal prides itself on meeting the needs of the global market and has adapted its technology and sales strategy to meet future demand. The U.S. primary aluminum market, specifically the primary aluminum valued-added product market, is a key component of Rusal's global portfolio and will remain so for the future. Rusal has supplied primary aluminum to the

U.S. aluminum industry for over two decades based on prevailing economic conditions and the needs of U.S. manufacturers. Any restriction on Rusal's imports of aluminum would therefore have adverse consequences for its U.S. customers, who need and rely on imports of Rusal's aluminum. Thus, Rusal should be completely excluded from this case.

We provide our detailed comments below in the remainder of this submission. We do so in several separate sections. We first briefly provide an overview of the aluminum industry. We next provide a detailed legal analysis of the meaning of the term "national security." In doing so, we explain that Commerce should narrowly interpret that phrase to mean military and defense needs, consistent with past court precedent and its own prior actions. We next document and explain that imports from all sources – and particularly from Russia – do not threaten national security under the relevant legal and economic considerations. In doing so, we demonstrate that imports are not excessive and that the U.S. domestic aluminum industry is actually quite healthy, and that it can easily supply all defense industry needs for aluminum. We also discuss and demonstrate that relief is not otherwise appropriate because it would not solve any of the domestic producers' problems, and it would simply harm downstream producers and consumers of aluminum products.

ARGUMENT

I. INTRODUCTION AND INDUSTRY OVERVIEW

Before turning to the merits, we first provide a brief overview of the aluminum industry and terminology. The domestic “aluminum” industry is not comprised of one single product or one single industry. The aluminum industry – like the steel industry – consists of many different sub-industries and sub-products. This includes a major division between “primary” aluminum (*i.e.*, “new aluminum” produced from bauxite) and other downstream “semi-finished” aluminum products (*i.e.*, strip, sheet, wire, profiles, tubes, *etc.*), which are produced from the “primary” aluminum input. The downstream semi-finished products are themselves also used as inputs to produce additional downstream finished products.¹

The aluminum industry also recognizes a distinction to account for “secondary” aluminum, which is aluminum produced from scrap or recycled aluminum rather than from bauxite. There is also a critical distinction between “non-alloyed” aluminum (*i.e.*, essentially pure aluminum in raw form) and “alloyed” aluminum, which is the essential raw material for nearly all finished aluminum products. In this regard, the only commercial purpose for pure aluminum (essentially created in unalloyed “ingots”) is to be used as an input to create downstream semi-finished and ultimately finished alloyed products.

The point is – “aluminum” is not one single commodity or industry. The U.S. Department of Commerce (“Department” or “Commerce”) must separately analyze each specific product category and industry in undertaking its “national security” threat analysis. Not all aluminum products or producers compete on equal footing with all other aluminum products or

¹ See, e.g., “US Primary Aluminium Supply: Competitive Conditions Affecting the US Aluminium Industry” (May 2017) (“CRU II”), appended in **Exhibit 2**; see also Aluminum Industry Association: Production and Processing, available at <http://www.aluminum.org/industries>, appended in **Exhibit 3**.

producers. Nor are all aluminum products relevant to “national security” concerns. Indeed, as we discuss below in more detail, only specialized “high purity” aluminum is critical to the defense industry.

Moreover, there is a critical distinction between (1) those U.S. producers creating primary aluminum (*i.e.*, smelters who create new raw aluminum from bauxite) and (2) downstream U.S. producers creating semi-finished aluminum products (*i.e.*, strip, sheet, wire, profiles, tubes, *etc.*) from the primary input. The Department must take account of several important and highly relevant distinctions as between U.S. “smelters” and U.S. downstream producers of “semis,” including the following points:

- U.S. Smelters of Primary Aluminum – U.S. smelters comprise a relatively small share of total U.S. aluminum production. They are generally older and inefficient and they have very high energy costs. U.S. smelters produce less than 20% of the aluminum demanded by downstream U.S. producers of semi-finished aluminum.²
- Downstream U.S. Producers of Semis – Conversely, U.S. downstream producers of semis comprise a large share of total U.S. aluminum production, approximately *ten times larger than U.S. production of primary aluminum*. These downstream producers cannot obtain all the primary input they need from domestic U.S. producers. They must therefore import primary material from many sources.

The Department should factor into its national security analysis all of these different aspects of the aluminum industry. This includes separately analyzing each of the different aluminum products (*i.e.*, primary aluminum, semi-finished aluminum, alloyed aluminum, pure and high purity aluminum, *etc.*). The Department should also consider the impact of imports on *all domestic aluminum producers*, including the important *downstream producers of semi-finished aluminum*. Downstream producers of semis actually account for a much larger share of

² See CRU II, at pages 8, 14, 16, (noting total domestic primary production of less than []), appended as **Exhibit 2**; See also CRU Executive Summary (“CRU I”) at 3-4 (noting same), appended as **Exhibit 1**.

total U.S. aluminum output. The downstream sector also critically needs aluminum input and cannot survive without imports.

II. THE TERM NATIONAL SECURITY SHOULD BE INTERPRETED NARROWLY TO MEAN NATIONAL DEFENSE

This part of the submission analyzes the relevant legal requirements the Department should apply in this case. Importantly, Section 232 only authorizes the Secretary of Commerce to assess whether imports of an “article” subject to the investigation “threaten to impair the *national security*” of the United States.³ The statute further instructs that, in making this determination, the Secretary shall consider the “effect” of such imports on national security.⁴

The plain language of the statute ties the investigation to the “effect” of imports on “*national security*.”⁵ Court decisions and prior Section 232 investigations demonstrate that Commerce should focus its inquiry *narrowly* on “national security” implications only, including the impact of imports on *traditional military and defense needs*. The Department may not simply emphasize in its analysis the impact (or potential impact) of imports on the general health of the domestic industry or the economy as a whole. To the extent Commerce assesses the overall health of the domestic industry, it may only consider whether imports threaten the fundamental ability of the industry to supply the very limited needs of the defense industry. This is an extremely high standard and one that is not met in this case. We discuss this below.

³ See 19 U.S.C. § 1862(b)(3)(A) (emphasis added).

⁴ See *id.*

⁵ *Id.*

A. Commerce’s “National Security” Analysis Should Focus on Military and Defense Needs

The U.S. Supreme Court (“Court”) has noted that the Section 232 statute uses the term “national security” and not “national interest.”⁶ The term “national security” as used in the statute is much “narrower” than the concept of “national interest.”⁷ Accordingly, Commerce’s analysis should focus narrowly on true national security concerns and not on broader national interest concerns. The Court also emphasized that the statute does not provide the President unfettered discretion in applying remedies, even when imports might threaten to impair the national security.⁸

Commerce itself has also typically applied a rather narrow approach when gauging the effect of imports on “national security” in prior Section 232 proceedings. In the most recent Section 232 case involving imports of *Iron Ore and Semi-Finished Steel* (“*Iron Ore*”), Commerce specifically considered the impact of imports on “military or national defense” capabilities, including “military defense of the U.S. homeland” and “the ability to project U.S. military capabilities globally.”⁹ In doing so, Commerce adhered to the approach used in other Section 232 cases where it had focused its “national security” inquiry on Department of Defense (“DOD”) requirements for the product at issue.¹⁰

Commerce has followed a similar narrow and military-oriented approach in assessing “national security” in most other Section 232 cases. Thus, in the *Effect of Imports of Uranium*

⁶ See *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548, 569 (1976). The Court noted that Congress had explicitly rejected an amendment with language authorizing an inquiry based on the broader term “national interest” rather than “national security.” See *id.*

⁷ *Id.*

⁸ See *id.* (noting the statute does not authorize the President to take “{a}ny action” whatsoever without consideration of the impact on imports).

⁹ *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security* (Oct. 2001), at 5 (“*Iron Ore*”).

¹⁰ See *id.*, citing *The Effects on the National Security of Imports of Crude Oil and Refined Petroleum Products* (1999) (“*Crude Oil*”) (noting the Department looked “only at DOD requirements when assessing national security needs”) (emphasis added).

on the *National Security* (Sept. 1989), Commerce essentially limited its “national security” analysis to a review of the impact of imports on U.S. productive capacity needed to supply “national defense” needs and particularly in an “emergency scenario.”¹¹ Similarly, in *Investigation of Import of Bolts, Nuts, and Large Screws on the National Security*, Commerce also focused its “national security” analysis on direct and indirect DOD needs for such items, and particularly in the context of maintaining “capacity to mobilize resources efficiently and effectively in the event of a national emergency.”¹²

Thus, both the plain language of the statute (as interpreted by the Court) and Commerce’s own consistent practice in prior Section 232 investigations demonstrate that a narrow approach should be used in gauging the “effect” of aluminum imports on the “national security” in this case. Any such analysis should primarily assess the impact of such imports on the capability of the domestic industry to meet DOD and military requirements, and particularly in the context of emergency preparedness and other conflict scenarios. Any such analysis should *not* include the impact of aluminum imports on the overall “national interest.”

B. Any Consideration of “Critical Industries” Should Also Focus Narrowly on Defense and Military Needs within Specified Industries

Commerce has sometimes broadened its “national security” analysis to include a review of the impact of imports on so-called “critical industries.”¹³ In doing so, Commerce has sometimes considered “the general security and welfare of certain industries beyond those necessary to satisfy national defense requirements” including those “that are critical to the

¹¹ *Effect of Imports of Uranium on the National Security* (Sept. 1989) (“*Uranium*”), at I-3 through I-4 (focusing on “whether imports have been a significant cause of the industry’s inability to meet national security requirements.”).

¹² *The Effects of Imports of Nuts, Bolts, and Large Screws of Iron or Steel (Except Mine Roof Bolts)*, 48 Fed. Reg. 8842-43 (Mar. 1983) (“*Nuts, Bolts and Large Screws*”) (noting requirements of “National Security Directive 47”). See also *The Effects of Imports of Plastic Injection Molding Machines on the National Security* (Jan. 1989) (“*Plastic Injection Molding Machines*”), at ES-2 (noting previous investigations basing “national security requirements in a one year mobilization period followed by one year of a major conventional conflict”).

¹³ See *Iron Ore* at 5.

minimum operation of the economy and government.”¹⁴ While Commerce has not provided an exhaustive definition of such “critical industries,” it has indicated that the term “critical industries” includes “telecommunications, energy, banking and finance, transportation, water system, and emergency services – both government and private.”¹⁵

However, even under its broader “critical industries” definition of “national security,” Commerce still only assesses those specific industries “related to supporting the U.S. national defense.”¹⁶ Commerce also only considers consumption within these critical industries that is “related to national security requirements.”¹⁷ Commerce has acknowledged that failure to limit its critical industries analysis in this manner would lead to an “over-estimate” of the consumption in these industries for purposes of its analysis.¹⁸

Importantly, Commerce’s use and analysis of a broader “national security” analysis based on “critical industries” still does *not* mean it is appropriate for Commerce to consider more generally whether imports have simply “harmed” the domestic industry. Commerce itself emphasized in *Iron Ore* that “the issue whether imports have harmed or threaten to harm U.S. producers *writ large* is beyond the scope of the Department’s inquiry, and need not be resolved here.”¹⁹

Thus, even under Commerce’s broadest measure of “national security” (*i.e.*, as one encompassing an assessment of “critical industries”), Commerce should still limit its analysis to

¹⁴ *Id.* This broader definition of “national security” that includes “critical industries” is not dictated by statute. *See id.* at 5.

¹⁵ *Id.* at 14. The Department has consulted its Critical Infrastructure Assurance Office to identify critical industries for this purpose. *See id.* In the *Iron Ore* case, the Department identified 28 such critical industries “related to supporting the U.S. national defense.” *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *Id.* at 17 (emphasis added).

imports' impact on national security, focusing on military and DOD needs, as well as the possible impact on the ability of certain "critical industries" to support the military and DOD.

Moreover, the last time Commerce used its "critical industries" analysis in a Section 232 case was in 2001, nearly 16 years ago. In defining the parameters of any such "critical industries" that it may use in this investigation, Commerce should update its definition of this term consistent with currently applicable legal standards, including those embodied in "Presidential Policy Directive/PPD 21: Critical Infrastructure Security and Resilience" (Feb. 12, 2013) ("PPD Directive 21"). This directive makes clear that the term "Critical Infrastructure" is limited to no more than the 16 industries identified therein and the term should also be given a narrow definition, limited as follows:

The term "critical infrastructure" has the meaning provided in section 1016(e) of the USA Patriot Act of 2001 (42 U.S.C. § 5195c(e)), namely systems and assets, whether physical or virtual, *so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.*²⁰

Clearly, this definition limits any such critical industries to those "so vital" that DOD, the military, or the U.S. Government simply cannot function. This is a very high standard and cannot possibly include any industry that is not of fundamental importance to "national security" and military and DOD needs.

Thus, for all these reasons, Commerce should ensure that its threshold analysis in defining the "national security" interest at stake in this case is properly and narrowly limited to assessing the impact of such imports in affecting or otherwise disrupting the needs of the military and DOD. Commerce should not resort to its broader "critical industries" analysis in this case at

²⁰ *Presidential Policy Directive/PPD 21: Critical Infrastructure Security and Resilience* (Feb. 12, 2013) ("PPD Directive 21") (emphasis added).

all. Such an approach is envisioned neither by the statute nor Court precedent. Commerce has only rarely considered “critical” industries, and it should not do so here. Nevertheless, should Commerce use such an analysis in this case, it should narrowly tailor it to an assessment of military and defense needs within those critical industries. Any other approach is unlawful.

III. THE DEPARTMENT’S NATIONAL SECURITY THREAT ANALYSIS SHOULD NARROWLY CONSIDER THE EFFECT OF IMPORTS ON THE DOMESTIC INDUSTRY’S ABILITY TO MEET DEFENSE SUPPLY REQUIREMENTS

In addition to narrowly interpreting the term “national security” as part of its threshold inquiry, Commerce should also use a very narrow analysis in determining whether imports actually “threaten to impair” national security. Commerce may only determine that imports threaten national security if either (1) the United States is so captive to imports from unreliable sources that it is vulnerable to critical military supply disruptions; or (2) imports have undermined the “viability” of the domestic industry such that it is fundamentally incapable of supplying the military and defense industry’s needs.²¹ These are very high standards and they are certainly not met in this case. We discuss these standards below.

A. Commerce Should Separately Analyze (1) Defense Industry Needs and (2) “Economic Welfare” Considerations of the Domestic Industry

After determining the “national security” interests at issue in the industry (*i.e.*, the needs of the military), Commerce next evaluates the “effect” of imports on the national security.²² Commerce does so by applying the relevant provisions of 19 U.S.C. § 1862(d) as implemented through the national security regulations, *codified* at 15 C.F.R. § 705.4. The statute and implementing regulations establish a bifurcated two-part analysis to determine the effect of

²¹ See, e.g., *Iron Ore; Crude Oil*.

²² See *Iron Ore*.

imports on national security.²³ Under the first part of the analysis, Commerce considers the effect of imports on the ability of domestic producers to meet “national defense” requirements.²⁴ Under the second part of the analysis, Commerce considers the effect of foreign competition (*i.e.* imports) on the “economic welfare” of the domestic industry.²⁵ We briefly discuss each of these criteria below.

National Defense Criteria: Regarding the “national defense” criteria, the applicable regulations require Commerce to consider the effect of the quantity of imports on national security, as well as the ability of domestic producers to meet specific national defense supply requirements, including criteria related to production, capacity, products, materials, and growth, as follows:

- (1) *domestic production* needed for projected national defense requirements;
- (2) *domestic capacity* to meet projected national defense requirements;
- (3) the availability of *labor, products, raw materials, equipment, and supplies* essential to the national defense;
- (4) *growth* requirements of domestic industries to meet national defense requirements; and
- (5) the effect of the quantity of the imported article.²⁶

Economic Welfare Criteria: Regarding the separate set of “economic welfare” criteria, the regulations require Commerce to consider various “economic” criteria relating to the domestic industry, including:

²³ *See id.*

²⁴ *See* 15 C.F.R. § 705.4(a).

²⁵ *See* 15 C.F.R. § 705.4(b).

²⁶ *See* 15 C.F.R. § 705.4(a) (emphasis added). The regulations specify that the Department may also consider “any other relevant factors.” *See also Iron Ore* at 6.

- (1) the impact of foreign competition on the economic welfare of any domestic industry essential to national security;
- (2) the displacement of any domestic products causing substantial unemployment, loss of investment or specialized skills and production capacity, or other serious effects; and
- (3) any other factors that are causing or will cause a weakening of our national economy.²⁷

B. Commerce Analyzes These Regulatory Factors under a Two-Part Test

In applying these regulatory criteria, Commerce has established a two-part test to determine whether imports threaten to impair national security in either of two ways: “(i) through excessive domestic dependency on unreliable foreign suppliers; or (ii) if such imports fundamentally threaten to impair the capability of the U.S. {domestic industry} to satisfy national security requirements.”²⁸

With regard to the first factor, Commerce interprets this to mean the United States is excessively dependent on “imports from unreliable or unsafe sources and thereby is vulnerable to a supply disruption.”²⁹ With regard to the second factor, Commerce emphasizes this latter requirement means such imports should actually “threaten the *viability* of U.S. industries and resources needed to produce domestically goods and services necessary to ensure U.S. national security.”³⁰ This latter requirement goes well beyond any type of normal general “injury” standard of the type imposed in traditional trade remedy cases. Under this standard, any type of harm caused by imports should be so consequential that it actually affects the “*viability*” of that industry to supply national defense needs.

²⁷ See 15 C.F.R. § 705.4 (emphasis added). The regulations specify that the Department may also consider “any other relevant factors.”

²⁸ See Report on the Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, 67 Fed. Reg. 1958, 1959 (Jan. 15, 2002) (“Iron Ore Summary”).

²⁹ *Iron Ore* at 6.

³⁰ See *id.* at 7 (emphasis added).

In its 2001 *Iron Ore* Section 232 investigation, Commerce determined that imports of the steel and iron ore products at issue did not threaten to impair the national security, despite the fact that the U.S. International Trade Commission (“ITC”) determined at the very same time that the domestic steel industry’s “serious injury” warranted safeguard measures.³¹ Commerce acknowledged that: “There can be no question that the U.S. steel industry generally – and their iron ore suppliers – have endured and continue to endure substantial economic difficulties.”³² Nevertheless, Commerce issued a negative determination in the Section 232 case, noting specifically that “based on the information obtained during the course of this investigation, the Department is unable to conclude that imports of iron ore and semi-finished steel *fundamentally threaten the capability* of U.S. iron ore and semi-finished steel producers to satisfy national security requirements.”³³

Section 232 imposes a much higher standard than typical trade cases regarding an assessment of the state of “injury” or “harm” to the domestic industry that is required for some form of relief. Section 232 is an extraordinary proceeding that requires extraordinary harm to permit relief. It should be used sparingly.

IV. COMMERCE SHOULD CONDUCT ITS NATIONAL SECURITY ANALYSIS SEPARATELY FOR INDIVIDUAL ALUMINUM PRODUCTS

With the above legal requirements in mind as to the meaning and scope of the term “national security” (and the framework for analyzing whether imports “threaten to impair national security”), we next discuss the scope of Commerce’s analysis with respect to the specific products at issue in this case. In particular, Commerce should *not* conduct one general “national security” inquiry that is applicable generically to all “aluminum” products. Rather,

³¹ *See id.* at 37.

³² *Id.*

³³ *Id.* (emphasis added).

Commerce should conduct its “national security” analysis separately for individual aluminum products. This is consistent with past Commerce practice in virtually all prior Section 232 cases. This is also consistent with the way Commerce conducts trade remedy proceedings. Any effort to conduct a single analysis for all “aluminum” would ignore commercial reality. We discuss this below.

A. Commerce Typically Conducts Its National Security Analysis Separately by Individual Products

Commerce’s initiation notice states that this investigation seeks to determine the effects of imports of “*aluminum*” on national security.³⁴ The notice provides no definition or meaning of the scope of the term “aluminum.” Nor does it discuss or mention the various different types of “aluminum” in the market. It simply treats all “aluminum” products the same. But “aluminum” is not one single product or one single industry. The aluminum industry – like the steel industry – is actually comprised of many different products, differentiated by physical characteristics, manufacturing processes, end-uses, markets, sales and distribution channels, supply and demand, *etc.*³⁵

Commerce should recognize this fundamental reality for purposes of its “national security” analysis by separately identifying each different aluminum product at the outset of this case. Commerce should then separately analyze the national security implications of each such product. Such differentiation among the various aluminum products is the only proper way to actually determine which specific aluminum products (if any) might threaten to impair national security. Otherwise, Commerce runs the risk of broadly (and wrongly) including within any

³⁴ See *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum*, 82 Fed. Reg. 21,509 (May 9, 2017).

³⁵ See *e.g.*, CRU II at Appendix Glossary, **Exhibit 2**.

possible remedy various individual aluminum products that have no impact on national security whatsoever.

This is precisely what Commerce has done in prior Section 232 investigations involving commodity products. Thus, in the investigation involving *Iron Ore and Semi-Finished Steel*, Commerce recognized that all “semi-finished steel” in that case actually consisted of various sub-products, including “ingots, slabs, blooms, and billets of all grades (carbon, stainless, and alloy).”³⁶ Commerce then considered import trends not only for all “semi-finished” products as a whole, but also separately by various groupings of these sub-products.³⁷

Commerce similarly recognized subcategories of products in other Section 232 investigations, including but not limited to those involving *Gears and Gearing Products*³⁸ (separately analyzing (1) aerospace gears, (2) marine gears, (3) industrial gears, and (4) automotive gears); *Plastic Injection Molding Machines*³⁹ (separately analyzing various types of machines and plastics, including (1) polymer matrix composites, (2) specialty plastics, and (3) commercial grade plastics), and *Anti-Friction Bearings*⁴⁰ (separately recognizing and analyzing fifteen different categories of bearings).

Commerce should follow the same analytical approach in this case and separately identify, recognize, and analyze the impact of different aluminum products on national security. Such a disaggregated analysis is not only consistent with its prior practice, but also imposed by the statute, which requires that any such investigation be conducted with regard to imports of an

³⁶ *Iron Ore* at 11-12.

³⁷ *Id.* at 28-36.

³⁸ *The Effect of Imports of Gears and Gearing Products on the National Security* (1992) (“Gears”), at VII-4 to VII-7.

³⁹ *Plastic Injection Molding Machines* at IV-1 through IV-6.

⁴⁰ *The Effects of Imports of Anti-Friction Bearings on the National Security* (July 1988) (“Anti-Friction Bearings”), at ES-4 through ES-5.

“article.”⁴¹ Clearly, the term “article” in this context refers to imports of specific aluminum products and not generally to all aluminum products.

Thus, a proper analysis of the impact of “aluminum” imports on “national security” requires that the Bureau of Industry and Security (“BIS”) segregate its investigation of “aluminum” generally into individual aluminum products and industries. We discuss below in the next section the most appropriate aluminum categories for this purpose.

B. Commerce Should Establish Several Specific and Well-Defined Product Categories for Purposes of its National Security Analysis

Commerce should disaggregate all broad “aluminum” products into specific and narrower product categories. Because this investigation focuses on “imports” of aluminum, the Harmonized Tariff Schedule of the United States (“HTSUS”) is a logical starting place, as it provides the various groupings used for import classification purposes. As shown below, Chapter 76 of the HTSUS sets out sixteen different categories of aluminum products, as follows:

HTSUS	Product	2016 Quantity (MT)	% Share Imports
7601	Unwrought	4,276,309	60%
7602	Waste	589,250	8.3%
7603	Powder/Flakes	15,217	*
7604	Bars/Rods	202,757	2.8%
7605	Wire	269,989	3.8%
7606	Plates/Sheet/Strip	927,977	13%
7607	Foil	261,032	3.6%
7608	Tubes/Pipes	24,127	*
7609	Fittings	6,565	*
7610	Structures	133,062	
7611	Reservoirs	14	*
7612	Casks	*	*
7613	Containers	*	*
7614	Stranded Wire	24,665	*
7615	Household Articles	181,983	2.5%
7616	Other	538 ^{*42}	*

⁴¹ See 19 U.S.C. § 1862(b)(1)(A).

	TOTAL	7,095,204	
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Of the above 16 different categories, import volumes are concentrated in the following six HTSUS subheadings: 7601 (unwrought); 7606 (plates/sheet/strip); 7602 (waste and scrap); 7605 (wire); 7607 (foil); and 7604 (bars/rods/profiles). Unwrought (HTSUS 7601) is by far the largest import category. The HTSUS also recognizes distinctions at the sixth digit within each of these categories to account for “alloyed” aluminum and aluminum that is “not alloyed.”⁴³

While the above HTSUS categories are useful for understanding overall import trends, the aluminum industry itself more broadly recognizes a distinction as between “primary” aluminum (*i.e.*, “new aluminum” produced from bauxite), which is the essential unfinished aluminum input used to produce initial aluminum products (*i.e.*, billets, slabs, ingots), and all other “semi-finished” aluminum products (*i.e.*, strip, sheet, wire, profiles, tubes, *etc.*), which are also used to produce additional downstream products, but which have been further worked.⁴⁴ The industry also recognizes a distinction to account for “secondary” aluminum, which is aluminum produced from scrap or recycled aluminum rather than from bauxite.⁴⁵ Imports of “secondary” unwrought aluminum are insignificant. The industry also emphasizes the critical distinction between “non-alloyed” aluminum (*i.e.*, essentially pure aluminum in raw form) and “alloyed” aluminum.⁴⁶ The only commercial purpose for pure aluminum (essentially created in unalloyed “ingots”) is to create semi-finished and ultimately finished alloyed products.

⁴² These figures with * are combined from HTSUS categories. Source: US ITC DataWeb - <https://dataweb.usitc.gov/>; Data on this site have been compiled from tariff and trade data from the U.S. Department of Commerce and the U.S. International Trade Commission.

⁴³ See Harmonized Tariff Schedule of the United States 2017 (“HTSUS”), Chapter 76.

⁴⁴ See, *e.g.*, **Exhibit 2**, CRU II at Appendix A Glossary

⁴⁵ *Id.*

⁴⁶ *Id.*, CRU II at Appendix A Glossary.

Based on HTSUS categories, industry standards, import volumes, and defense industry needs, Commerce should consider at least the following seven different broad product categories in assessing whether imports of aluminum threaten to impair national security.

Product Category⁴⁷	Product Descriptions	HTSUS
Primary (Not Alloyed)	Re-melt ingots	7601.10
Primary (Alloyed/PFA)	Billets, slabs, ingots	7601.20
Semi-Finished (Not Alloyed)	Plates, sheets, strips, wire, bars, rods, profiles, <i>etc.</i>	7604.10; 7605.10; 7606.10; 7608.10; 7614.10
Semi-Finished (Alloyed)	Plates, sheets, strips, wire, bars, rods, profiles, <i>etc.</i>	7604.20; 7605.20; 7606.20; 7608.20; 7614.20
Foil	Foil – all types	7607
Scrap	Waste and scrap	7602
High Purity Aluminum	High purity (> 99.9%)	7601.10

Importantly, Commerce should focus its product-specific national security analysis on different types of *products*, not different *manufacturing processes*. While Commerce should still consider the relevant economic impact of imports on both “smelters” (producing “primary” aluminum) and those producing “secondary” aluminum (*i.e.*, from scrap), the fact remains that the basic commodity-grade finished or semi-finished aluminum produced either from “primary” or “secondary” aluminum input (or both) is essentially the same at the end of the manufacturing process. And it is these finished products – from whatever source (*i.e.*, primary or secondary) – that are consumed by the military and defense industry.

⁴⁷ We have not separately shown “primary” and “secondary” production. We include “secondary” in the “primary” account. We do this for two reasons. First, the HTSUS does not separate “primary” from “secondary.” Second, downstream aluminum products ultimately compete with products produced from “primary” aluminum, including products purchased by the defense industry. In this regard, there is no need to separate primary from secondary sources for purposes of the Department’s “national security” analysis.

Thus, Commerce should focus its investigation on these industry product groupings, and it should focus on those categories with the most significant import volumes (*i.e.*, primary, semi-finished, foil, scrap, *etc.*) as well as those of most importance to the military and defense industries (*i.e.*, high purity). In doing so, and as we discuss later in this submission, Commerce should also consider the relevant economic effects on all segments of the U.S. industry, including in particular the positive impact of imports on the downstream producers of semi-finished aluminum.

Importantly, of all aluminum products, only a very small category of specialized “high purity” aluminum is critically important for DOD and military needs. As will be shown in the next section, the domestic industry can easily meet these needs with existing capacity and production. All other aluminum products are not critical to defense and military needs. Therefore, Commerce should focus its national security inquiry only on “high purity” aluminum. Nevertheless, as will also be discussed below in the next section, to the extent any other such aluminum products are tangentially or otherwise indirectly related to military or defense needs, the domestic industry can easily meet any such needs for those items as well.

V. ALUMINUM IMPORTS DO NOT THREATEN NATIONAL SECURITY

As discussed above, to determine whether aluminum imports threaten national security, Commerce should consider the needs of the military and defense industries, and whether the domestic industry can satisfy those needs.⁴⁸

This section demonstrates factually, through application of the regulatory national security provisions, that aluminum imports do *not* threaten national security. This is true broadly for all aluminum products. It is also true for individual product segments of the aluminum

⁴⁸ See 15 C.F.R. § 705.4.

industry. The vast majority of imported aluminum consists of regular commercial grade “primary” aluminum that is not critical to the military or defense industry. Rather, only specialized “high purity” aluminum (*i.e.*, P0406 or P0404,⁴⁹ including both primary HP and downstream HP products) is critical to the defense industry. The domestic industry can easily meet the needs of the defense industry for this type of specialty aluminum. The domestic industry can also meet defense industry needs for any other type of aluminum that may be consumed in additional less critical applications.

We demonstrate this below based upon the relevant “national security” criteria as set forth previously. We undertake this analysis separately following Commerce’s bifurcated approach. In doing so, we first consider in this section (Section V) the relevant “national defense” criteria. We discuss in the next section (Section VI) the relevant “economic welfare” criteria. Before doing so, we first briefly summarize below the relevant legal standards applicable to the “national defense” analysis.

A. Legal Standards

As discussed in detail previously in Section III, Commerce uses a bifurcated approach to determine whether imports threaten national security. In the first part of its bifurcated analysis (*i.e.*, its “national security” analysis), Commerce applies the various “national defense” criteria from 19 C.F.R. § 305.4, whereby it assesses whether domestic producers maintain suitable production, capacity and labor such that they may satisfy all national defense needs for the merchandise at issue, including the possible “growth” of those needs.⁵⁰

⁴⁹ *See* “International Designations and Chemical Composition Limits for Unalloyed Aluminum,” at page 2, available at <http://www.aluminum.org/sites/default/files/goldsheetsmarch2007.pdf> (“Gold Sheets”).

⁵⁰ *See* 15 C.F.R § 705.4. *See also* previous discussion in Section II.

In addition to assessing these productive and growth requirements of the domestic industry, Commerce also considers various factors regarding the importation of the merchandise, including the “quantity” of the imports and “other circumstances” related to importation of the products.⁵¹ In performing this analysis regarding the quantity and circumstances of imports, Commerce states that imports may threaten national security if it finds “excessive domestic dependency on unreliable foreign suppliers”⁵² such that the domestic industry is “vulnerable to a supply disruption.”⁵³

We discuss these factors below separately for each of the main categories of aluminum imports that are relevant to Commerce’s “national security” analysis. We first demonstrate that Commerce should only assess the effect of “high purity” aluminum imports on national security, and that such imports do not threaten national security. This should be the end of the “national security” inquiry. Nevertheless, we also demonstrate that imports of all other types of aluminum (including semi-finished aluminum, foil, and all aluminum) also do not threaten national security.

B. National Security Is Not Dependent on Imports of High Purity Aluminum

Only a very small portion of all aluminum products is critical to the national defense. In fact, the overwhelming majority of primary aluminum, semi-finished aluminum, and other downstream products are simply not suitable for defense or military applications. Rather, the most important type of aluminum used for military or defense applications is specialized “high purity” aluminum.

1. Only High Purity Aluminum is Critical to Defense Applications

⁵¹ *Id.*

⁵² See Iron Ore Summary, at 67 Fed. Reg. 1959.

⁵³ *Iron Ore* at 6.

In initiating this investigation, Secretary Ross recognized the underlying purpose of this investigation is to address any perceived threat to U.S. producers in supplying “high purity” aluminum to the defense industry. Secretary Ross noted that “the defense angle” of this investigation “is that *high-purity aluminum* is used in the F-35” as well as other military aircraft and vehicles.⁵⁴ Secretary Ross explained that, “in the event of a war, domestic manufacturers might be unable to meet the Pentagon’s needs.”⁵⁵ A Commerce press release elaborated that it is in fact “*high purity aluminum*” that is “needed for many national security applications,” including for such military products as “the F-35, F-18, C-17, and next generation military vehicles.”⁵⁶

High purity” aluminum is really the only aluminum product that is critical to defense and military applications.⁵⁷ Such “high purity” aluminum is a type of specialized primary aluminum containing more than 99.9% aluminum, along with a lower silicon and iron content (*i.e.*, less than 0.04% silicon and less than 0.06% iron).⁵⁸ Most such high purity aluminum is classified with the relevant USA quality standard of P0406 or higher (such as P0404, P0303, P0202, and P0201).⁵⁹

⁵⁴ See *Trump Administration Opens Trade Investigation on Aluminum* (Apr. 26, 2017), <https://www.bloomberg.com/politics/articles/2017-04-26/trump-administration-said-to-open-trade-probe-on-aluminum> (quoting Secretary Ross) (emphasis added).

⁵⁵ *Id.*

⁵⁶ See [President Donald J. Trump Signs Presidential Memo Prioritizing Department of Commerce National Security Investigation into Aluminum](#), Department of Commerce Press Release (Apr. 27, 2017) (emphasis added).

⁵⁷ See, e.g., *Harbor Aluminum Special Alert: Is high purity aluminum a national security concern for the US?* (Apr. 27, 2017) (“*Harbor Article*”), available at <http://www.harboraluminum.com/reports/9072>, appended as **Exhibit 4**.

⁵⁸ See *id.* See also *International Designations and Chemical Composition Limits for Unalloyed Aluminum* (Mar. 2007) at 2 (“*Gold Sheets*”), available at <http://www.aluminum.org/sites/default/files/goldsheetsmarch2007.pdf>, appended as **Exhibit 5**.

⁵⁹ See *id.*

2. **The Domestic Industry Easily Satisfies All Defense Industry Needs for High Purity Aluminum**

The domestic industry easily satisfies all “national defense” factors specified at 15 C.F.R. § 305.4 (*i.e.*, capacity production, growth, labor, *etc.*) for high purity aluminum in this case. Such “high purity” aluminum products are specialized and service a relatively small market. Nevertheless, these products are readily available from domestic sources to service all DOD and military needs, and there is no excessive reliance on imports to undermine this supply. We discuss the relevant factors below.

(i) **The Domestic Industry Has Ample Quantities, Capacity, Labor and Growth**

While hard data on precise military needs for high purity aluminum are not widely available, credible public sources estimate that the total demand for “high purity” aluminum by the military is no more than 30,000 metric tons (“tons”) per year, which represents less than 0.6% of the total primary aluminum market overall, and only about 10% of total domestic consumption (300,000 tons) of high purity aluminum.⁶⁰ Total domestic production of high purity aluminum is estimated to be more than three times greater than current military needs (*i.e.*, more than 90,000 tons per year).⁶¹ *See Id.* Current domestic inventories of such high purity aluminum are also quite plentiful, amounting to about 75,000 tons, which is enough to supply all military needs for at least the next 2.5 years.⁶² Thus, domestic production, capacity, and labor are more than adequate.

There is also a second way to produce HP or better aluminum through a refining process known as fractional crystallization. Harbor Intelligence estimates that using fractional

⁶⁰ *See Exhibit 4, Harbor Article 1.*

⁶¹ *See id.*

⁶² *See Bloomberg News, U.S. Has Obscure Tech Aluminum Into Military-Grade Metal (June 7, 2017), Mitsui Daily Aluminum Wrap, appended as Exhibit 6.*

crystallization to produce high-purity aluminum would only be about 2% more expensive than using the traditional high-purity smelting process. Primary aluminum turned into the high purity variety would cost approximately \$2,548 per ton, while high-purity aluminum right now costs approximately \$2,493 per ton in the spot market. In this context, Harbor Intelligence analyst Tom Leary has stated the following at a recent industry conference: “If the Defense Department needed the 30,000 tons a year needed to consume, they could go greenfield for \$25 million to produce it.”⁶³

Thus, domestic producers have more than adequate growth potential to supply national defense needs. In any event, there is no evidence to suggest the military’s needs for high purity aluminum are growing. Indeed, as will be shown in the next section, the military’s overall spending on aluminum is decreasing, and is projected to decrease even further. The domestic industry can easily supply all military and defense needs for high purity aluminum, now and in the future.

(ii) Imports Are Neither Excessive Nor From Unreliable Sources

Imports of high purity aluminum are simply not relevant to the military’s needs. Available import data and estimates suggest that imports currently account for only about 200 tons of such material, all of which is used for “non-military” domestic consumption of high purity aluminum.⁶⁴ Imports only service a small portion of the non-military sector of the “high purity” aluminum market, which is estimated to be about 270,000 tons.⁶⁵ More than 50% of such imports are from Canada, meaning even most imports are from a neighboring country

⁶³ **Exhibit 6**, Bloomberg News.

⁶⁴ **Exhibit 4**, *Harbor Article 1*.

⁶⁵ **Exhibit 4**, *Harbor Article 1*.

providing a “reliable” supply. This fact further supports the notion that imports do not threaten national security.⁶⁶

(iii) Conclusion: High Purity Aluminum Imports Do Not Threaten National Security

Therefore, for these reasons, aluminum imports do not threaten to impair national security. The vast majority of all aluminum is simply not used for national defense purposes. The only type of aluminum critical to national security is “high purity” aluminum, which the domestic industry can and does readily supply. Imports are primarily from “reliable” supplies. Based on these findings, Commerce should conclude that no imports of any aluminum products threaten to impair national security at all, and it should issue a negative determination across the board for all imports from all countries.

C. The Domestic Industry Satisfies National Defense Requirements for All Other Aluminum Products

Nevertheless, should Commerce consider the broader effect of other types of aluminum on national security (*i.e.*, aluminum other than “high purity” aluminum, including all semi-finished aluminum, primary aluminum, and other downstream products), it should reach similar negative results for all other aluminum products of any potential relevance, and for the aluminum industry at large. As discussed below, the domestic industry can satisfy all DOD and military needs for all other types of aluminum and aluminum products and imports are neither excessive nor otherwise impact its ability to do so.

1. The Domestic Industry Satisfies All Defense Industry Needs for Other Non-HP Semi-Finished Aluminum

“High purity” aluminum is used to make a variety of rolled, forged, or extruded semi-finished products consumed by the military. Aside from such semi-finished high purity

⁶⁶ See, *e.g.*, *Iron Ore*, at 6-7 (noting one factor is whether imports are from unreliable suppliers).

aluminum products, the military also consumes a limited amount of other semi-finished aluminum products that are not made from high purity aluminum. Such non-HP semi-finished products consumed by the defense industry include plate, forgings, extrusions, and castings.⁶⁷ The most significant of these semi-finished materials is known as “aerospace” plate,⁶⁸ all of which is produced in U.S. rolling mills, including Arconic, Constellium, and Kaiser.⁶⁹

(i) *The Domestic Industry Has Ample Quantities, Capacity, Labor and Growth*

The U.S. military consumes approximately 150,000 to 200,000 tons of various semi-finished aluminum products each year for various military applications, including for the production of aircraft, vehicles, and munitions.⁷⁰ This is less than 2% of all semi-finished aluminum produced and consumed in the U.S. each year.⁷¹ Thus, current capacity, production, and labor at U.S. mills are more than adequate to supply the military at current levels, now and in the future.

Moreover, U.S. mills could easily increase current production of such material four-fold if necessary by making use of excess capacity and/or switching production from commercial-grade plate to the more specialized aerospace plate used in military applications.⁷² Importantly, the input stock needed to produce these materials is also obtained from U.S. mills.⁷³ Thus, domestic producers have the growth potential to supply increasing demand from the military, if

⁶⁷ See *Special Analysis (Part II): Are Aluminum Imports a Threat to US National Security?* (Apr. 28, 2017) (“*Harbor Article II*”), appended as **Exhibit 7**.

⁶⁸ “Aerospace plate” describes the group of aluminum rolled products used in aerospace applications. Aerospace plates usually represent the 2xxx and 7xxx groups of alloys, where the main alloying element is Copper for 2xxx series and Zinc for 7xxx series. See, e.g., <http://www.kaiseraluminum.com/markets-we-serve/aerospace/> and http://aviationmetals.net/aluminum_sheet.php.

⁶⁹ *Harbor II*.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

needed. But, as noted above, total aluminum demand from the military has been flat to trending downward, and is expected to decrease more in the future. *See* next section.

(ii) Imports Are Neither Excessive Nor from Unreliable Sources

Moreover, there is no evidence to suggest imports of semi-finished products are excessive or otherwise threaten domestic producers' continued ability to supply defense needs. Imports are sourced from many "diverse" and reliable suppliers, including Canada, Mexico, Germany, Argentina and others. Canada or Mexico account for nearly half or more than half of such imports for most of the relevant categories of "semi-finished" imports.⁷⁴

In any event, total imports of semi-finished products amounted to only about 1.4 million tons in 2016.⁷⁵ This is a small percentage of total domestic production of all semi-finished material, which is estimated at about 9.5 million tons in 2017. Thus, total imports of semi-finished material constitute less than 15% of all domestic production of semi-finished materials. Furthermore, as noted above, at least half of all imports are from nearby "reliable" suppliers.

(iii) Conclusion: Semi-Finished Imports Do Not Threaten National Security

Thus, the domestic industry can easily and adequately supply all US defense needs for semi-finished aluminum products, and imports have no effect on its ability to do so.

⁷⁴ *See* **Exhibit 8**, Source: US ITC DataWeb, available at <https://dataweb.usitc.gov/>. Data on this site have been compiled from tariff and trade data from the U.S. Department of Commerce and the U.S. International Trade Commission. Import data of semi-finished products for HTSUS 7604, 7605, 7606, 7608, 7614. *See also* International Trade Centre ("ITC") Market Analysis and Research, available at <http://www.trademap.org/>. While China shows up as the leading exporter for certain "plate" (HTSUS 7605), China is not actually exporting plate. As discussed later in this submission, China is actually misclassifying certain "primary" unwrought material as plate to avoid Chinese VAT payments. Once corrected, China is exporting very little plate as semi-finished product.

⁷⁵ *See* **Exhibit 9**, Total imports of semi-finished products.

2. The Domestic Industry Satisfies All Defense Industry Needs for All Other Aluminum Products – Whether Direct or Indirect

The domestic industry can easily supply any aluminum required by the military, whether primary, semi-finished, or further manufactured, and whether purchased directly or indirectly. This is substantiated and confirmed by DOD’s own projected purchases for primary aluminum and manufactured aluminum products. In fact, in the most recent such report (issued in November 2013), DOD projected its total purchases for *all aluminum products* (whether direct or indirect and in whatever form) would amount to no more than \$2.2 billion dollars during 2016 and 2017.⁷⁶ This is shown below separately for “primary” and manufactured aluminum.

Type	Direct/Indirect	2016 (\$ millions)	2017⁷⁷ (\$ millions)
Primary	<i>Direct</i>	4	4
	<i>Indirect</i>	776	780
	subtotal	781	784
Manufactured	<i>Direct</i>	42	41
	<i>Indirect</i>	1,403	1,405
	subtotal	1,445	1,446
Grand TOTAL		2,226	2,230

Importantly, DOD’s projection constitutes a very small amount of aluminum relative to the total aluminum market. It also represents total such purchases by DOD for *all aluminum products, in whatever form*, and it includes both *direct and indirect purchases*. As DOD explained in the report, “direct” expenditures are those made by DOD itself whereas “indirect” expenditures are those purchases “generated throughout the economy – of items used to produce goods bought by DOD.”⁷⁸ DOD’s definition of such “indirect” purchases was quite broad and far-reaching. DOD explained:

⁷⁶ See U.S. Department of Defense *Projected Defense Purchases: Detail by Industry and State, Calendar Years 2012 Through 2018* (Nov. 2013) (“*DOD Report*”) at 216-217, appended as **Exhibit 10**.

⁷⁷ See *id.*

⁷⁸ *Id.* at 2.

. . . indirect (sometimes called intermediate) expenditures reflect the costs of materials, tools, and parts that prime contractors buy from suppliers in order to perform work for which DOC has contracted. Those sales in turn, trigger subsequent rounds of transactions as subcontractors purchase goods and services from their major suppliers and those firms place orders with companies at lower tiers of the production chain. For example, a direct expenditure for aircraft stimulates indirect purchases for the electronic components, tires, aluminum, engineering and logistic services used to manufacture the aircraft. The term “indirect defense purchases” applies to this sequence of purchases – goods and services from subcontractors and lower-tier suppliers.⁷⁹

Thus, DOD’s estimate represents the broadest possible measure of total defense industry consumption of all aluminum products throughout the U.S. economy, of whatever form. It truly represents the broadest total measure of total actual consumption of all aluminum for military and defense needs, including all “primary” aluminum, semi-finished aluminum, and all additional downstream aluminum products contained in further manufactured aluminum.⁸⁰

(i) ***The Domestic Industry Has Ample Quantities, Capacity, Labor and Growth***

Importantly, the total value of DOD’s aluminum consumption of \$2.2 billion at this broad level (for all aluminum products) once again represents a very small portion of total domestic industry output. Indeed, total U.S. output of all aluminum products is estimated by the U.S. Geological Survey to be about \$95 billion.⁸¹ Thus, total DOD purchases of all aluminum products – both direct and indirect – once again represent only about 2% of total domestic output of aluminum. This is consistent with the above estimates provided for primary and semi-finished aluminum. This is also a conservative estimate of total aluminum production. The Aluminum Association estimates that the total output of aluminum in the economy is closer to \$186 billion,

⁷⁹ *Id.*

⁸⁰ *See id.* at 216-217 (showing separate breakouts for “primary” aluminum and “aluminum product manufacturing”).

⁸¹ *See* U.S. Geological Service *Mineral Commodity Summaries 2017* (“USGS Summaries”) at 9, appended as **Exhibit 11**.

“when all suppliers and related business functions are taken into account.”⁸² Under this broader (and more accurate) measure of aluminum output, total DOD requirements for all aluminum amount to barely 1%. Thus, total domestic production, capacity, and labor of all aluminum at the broadest level is clearly sufficient to supply any defense industry needs for aluminum.

Nor are there any concerns with regard to the need for growth by the domestic industry. Total DOD purchases of aluminum (both direct and indirect) and for all such products has continued to *decline* sharply the past few years. The DOD also projects its need for aluminum will decline even further in the immediate future. This can be seen in the following table, which sets forth the relevant data on DOD purchases of aluminum over the past five years (both direct and indirect, and including primary and manufactured items) and projected through 2018 (reporting purchases in \$ millions).⁸³

Year	2012	2013	2014	2015	2016	2017	2018
Primary	1,118	944	804	809	781	784	778
Manufactured	2,094	1,760	1,486	1,497	1,445	1,446	1,432
Total	3,212	2,704	2,290	2,295	2,226	2,230	2,210

As shown, DOD’s aluminum purchases are not only very small, but they have also steadily decreased the past five years and are projected to decrease even further this year and next. Total DOD purchase projections drop from \$3.2 million in 2012 to only \$2.2 million in 2018. That is a projected decrease of more than 30% in just a seven year period. There is no reason to expect this trend will change. Thus, there are no growth requirements for defense spending on aluminum. Regardless, the domestic industry has more than adequate capability to supply all such defense aluminum needs.

⁸² See *The Economic Impact of Aluminum*; Aluminum Association at www.aluminum.org/aluminum-advantage/economic impact-aluminum (visited June 8, 2017), appended as **Exhibit 26**.

⁸³ See **Exhibit 10**, *DOD Report* at 216-217.

Thus, by whatever measure, and regardless of the products, it is clear that total defense industry needs for all aluminum are very small relative to total domestic industry output. The domestic industry can easily satisfy any military or defense requirements, now and in the future. This includes all downstream aluminum products. Notably, an earlier version of the DOD projections breaks out the specific types of downstream products purchased by the military. As shown, it includes such items as aircraft engines, aircraft parts, communications equipment, motor vehicles, shipbuilding, tanks, electronic equipment, *etc.*⁸⁴ This demonstrates the economic importance of the downstream production of aluminum – both to the economy generally and the military – and that the domestic aluminum industry is not simply defined by smelters and the production of primary aluminum, as it contends. This notion is further reinforced by the fact that the military’s purchases of downstream aluminum far exceed its purchases of primary aluminum.⁸⁵

(ii) **Imports Are Neither Excessive Nor From Unreliable Sources**

Further, the pattern and volume of total aluminum imports reinforces that imports do not threaten to impair national security. As with imports of semi-finished products, imports of all aluminum are not excessive and they are sourced from many different reliable suppliers, including Canada, Mexico, Russia, Germany, the UAE, Argentina, South Africa, Brazil, and many others. Again, Canada and Mexico alone together account for well over 40% of all aluminum imported into the U.S. currently and for at least the past 10 years.⁸⁶ When imports from Germany, the UAE, Argentina, South Africa and Brazil are added, this total from all such countries accounts for at least 50% of all imports. That is clearly a diverse and safe supply.

⁸⁴ See *U.S. Department of Defense: Projected Defense Purchases - Detail by Industry and State* (Aug. 2003) (“*DOD 2003 Report*”) at 77, appended as **Exhibit 12**.

⁸⁵ See **Exhibit 10**, *DOD Report* at 216-217.

⁸⁶ See **Exhibit 13**, Share of Imports by Value.

Nor are total imports “excessive.” Total imports from all sources in 2016 amounted to approximately 7 million tons, with a total value of approximately \$18 billion.⁸⁷ This is still a small percentage relative to total domestic production and consumption. As noted previously, the most conservative measure of total domestic output for all aluminum products was at least \$95 billion in 2016.⁸⁸ Yet, as also noted previously, a more accurate measure of total output in the aluminum industry for all sectors (including “all suppliers and related business functions”) is actually closer to \$186 billion.⁸⁹

Thus, under a true “apples-to-apples” comparison of total imports of all aluminum to total domestic output of all aluminum products, imports account for approximately 9.6% of total aluminum output (*i.e.*, \$18 billion/\$186 billion as per above). Even by the most conservative measure, total imports of all aluminum still only amount to 18% of total output (*i.e.*, \$18 billion/\$96 billion). Thus, imports are not excessive by any measure and they do not disrupt domestic supplies. Commerce found that comparable or even higher levels of import penetration in the *Iron Ore* investigation (*i.e.*, 20% for semi-finished steel) were not excessive and therefore did not threaten national security.⁹⁰

Moreover, as will be discussed below, most aluminum imports consist of primary “unwrought” aluminum, which is an essential raw material used in downstream domestic production of semi-finished and other finished aluminum products. As such, imports of these primary materials actually ensure that downstream U.S. domestic producers of semi-finished material have an adequate source of raw materials so that they can meet U.S. demand for semi-

⁸⁷ See **Exhibit 14**, 2016 total imports of aluminum by country.

⁸⁸ See **Exhibit 11**, *USGS Summaries* at 9.

⁸⁹ See **Exhibit 22**, *The Economic Impact of Aluminum*; *Aluminum Association* at www.aluminum.org/aluminum-advantage/economic impact-aluminum (visited June 8, 2017).

⁹⁰ See *Iron Ore* at 2 (noting import levels of 7% for iron ore and 20% for semi-finished steel).

finished aluminum products. *See* Section VII.B. below. This is particularly important given that U.S. production of such downstream semi-finished materials is much larger than domestic production of primary aluminum, and it is far more important to the U.S. economy.

(iii) Conclusion: Imports of All Aluminum Products – and Particularly those from Russia – Do Not Threaten National Security

For these reasons, it is abundantly clear that the domestic industry can easily satisfy all defense industry needs for all aluminum products, and imports are neither excessive nor from unsafe or unreliable suppliers. Imports are relatively small and they are from diverse and steady suppliers located near the U.S. There is no threat to domestic producers' ability to supply all defense industry aluminum needs now and in the future for all aluminum products. Accordingly, even if Commerce considers all aluminum imports from all sources, it should issue a negative determination. Aluminum imports from all sources simply do not threaten national security. Moreover, imports from Russia have even less impact on national security and clearly do not threaten national security. Russia does not export "high purity" aluminum at all. Russia exports a stable but small volume aluminum that is needed by its U.S. customers. We document this later in this submission.

D. The Above Analysis Takes Account of Any "Critical Industries" Concerns

As discussed earlier in this submission, Commerce sometimes uses a broader "critical industries" analysis when considering whether imports threaten national security.⁹¹ For the reasons stated earlier, we believe Commerce should *not* use such an analysis. Nevertheless, the information provided above about DOD projected aluminum purchases demonstrates that aluminum imports do not threaten national security even under a broader "critical industries" type of analysis. In particular, DOD's projected purchases of all aluminum products from

⁹¹ *See, e.g., Iron Ore* at 5.

whatever source – and including both “direct” and “indirect” purchases – clearly satisfies even a broader “critical industries” analysis. The DOD projections cover any type of aluminum it actually consumes from all sources – both direct and indirect – and covering all segments of the economy. It includes purchases by defense contractors and their purchases from downstream suppliers as well. Indeed, it actually covers such indirect purchases even affecting downstream industries that are not among the 16 industries listed as “critical” in the *Presidential Policy Directive* concerning “critical” infrastructure.⁹² In short, this analysis provides a comprehensive overview of all aluminum consumed in whatever form and at whatever level of the supply chain, and for all segments of the economy of any relevance to the military or national defense. This clearly satisfies Commerce’s “critical industries” analysis as articulated in the *Iron Ore* Section 232 case. Even under this broader analysis, it is clear that aluminum imports do not threaten national security.

E. Commerce Should Exclude Aluminum Foil from its Analysis and Any Potential Remedies Because It Is Irrelevant to National Defense

Regardless of the breadth of its “national security” considerations, Commerce should exclude aluminum foil from its analysis and from this case. Clearly, aluminum foil has no relevance to *bona fide* national security implications. These types of products are used primarily for food preparations and similar applications.⁹³ While there are other applications and uses for certain foils depending on thickness and other characteristics, there is simply no credible argument that aluminum foil generally is “vital” to national security, even under the broadest measure of “critical industries.” For this reason, Commerce should simply exclude aluminum foil from any consideration for remedial action in the present investigation.

⁹² See *DOD Report at 2*; see also PPD Directive 21.

⁹³ See, e.g., USITC Publication 4684 at I-10 (noting foils are used “extensively in food” packaging, including common “household” preparations).

Regardless, consideration of the relevant “national defense” criteria discussed above provides another independent reason to exclude aluminum foil from this investigation. Even if aluminum foil is used by the defense industry, any such use is minimal and incidental. We have no available information for actual consumption of aluminum foil by the defense industry (other than as part of the total DOD projections noted above). However, if we assume that a relative share of DOD purchases is attributed to aluminum foil – per the above analysis – any such consumption by DOD would still be minimal compared to domestic industry production and capacity.

The most recent ITC data indicates that total U.S. apparent consumption of aluminum foil was \$1.8 billion in 2016.⁹⁴ Of this amount, domestic producers’ production currently accounts for more than 60% of such shipments.⁹⁵ Imports accounted for the remaining 40%. However, Chinese imports accounted for more than 65% of all imports.⁹⁶ Importantly, as we discuss later in this submission, Chinese foil exporters will soon be completely shut out of the U.S. market due to pending high AD and CVD duties that will be imposed very soon. Thus, the domestic industry will soon enjoy protection from the largest source of imports, thereby enabling it to gain an even larger share of the U.S. foil market. This will further solidify its dominant position in the domestic foil market regarding production, growth, and labor, thus enhancing its ability to provide whatever trivial amounts of foil might be tangentially purchased and consumed by DOD.

The other remaining non-Chinese imports are modest and available from reliable suppliers. The major exporting countries other than China are Canada, Germany, Russia, and

⁹⁴ *See id.* at Table IV-12.

⁹⁵ *Id.*

⁹⁶ *See id.*

Brazil. Others include Mexico, South Africa, Argentina, and the UAE.⁹⁷ Clearly, there are supplies available from diverse and reliable suppliers, thus further militating against any finding that imports of aluminum foil threaten national security.

For these reasons, Commerce should simply exclude aluminum foil from consideration in this case. It is not vital to national security, the domestic producers can satisfy any residual purchases by DOD, any imports are small (and would be smaller should China be blocked), and any remaining imports come from reliable suppliers.

VI. ALUMINUM IMPORTS DO NOT THREATEN TO IMPAIR THE CAPABILITY OF THE DOMESTIC INDUSTRY TO SATISFY NATIONAL SECURITY REQUIREMENTS

This section now analyzes the second prong of Commerce’s bifurcated national security analysis, which assesses the effect of imports on the “economic welfare” of the domestic industry based on various criteria set forth under the statute and regulations.⁹⁸ We first provide a summary of the legal and analytical framework and criteria. By then applying that framework to the U.S. aluminum industry, we demonstrate that the domestic aluminum industry overall is profitable and healthy, and the domestic aluminum industry’s employment, investment, specialized skills, and contribution to government revenue have improved, despite foreign competition.

Though domestic production capacity is more than adequate to supply U.S. defense and national security needs, the domestic industry requires a significant level of imports of primary aluminum for non-defense related downstream production. Thus, any import restrictions imposed under Section 232 on primary aluminum would harm the viability of the much larger downstream domestic industry. Further, the downstream sector of the domestic industry is thriving, despite

⁹⁷ See **Exhibit 15**, 2016 share of aluminum foil imports.

⁹⁸ See 19 U.S.C. § 1862; 15 C.F.R. § 705(b).

imports of downstream and semi-finished aluminum products. There are no other factors related to the domestic aluminum industry that are causing or will cause a weakening of the national economy. Accordingly, imports' overall impact on the domestic industry is positive and imports do not “threaten the *viability* of U.S. industries and resources needed to produce domestically goods and services necessary to ensure U.S. national security.”⁹⁹ We discuss this below for each relevant economic factor.

A. Overview and Analytical Framework

This second group of criteria that Commerce considers in determining the effect of imports on national security under Section 232 focuses on whether imports weaken the national economy and impair national security:

In the administration of this section, the Secretary and the President shall further recognize the close relation of the *economic welfare* of the Nation to our national security, and shall take into consideration the impact of foreign competition on the *economic welfare* of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.¹⁰⁰

Commerce regulations similarly identify the relevant “economic welfare” criteria:

- (1) the impact of foreign competition on the economic welfare of any domestic industry essential to national security;
- (2) the displacement of any domestic products causing substantial unemployment, loss of investment or specialized skills and production capacity, or other serious effects; and

⁹⁹ See *Iron Ore* at 7 (emphasis added).

¹⁰⁰ 19 U.S.C. § 1862(d).

(3) any other factors that are causing or will cause a weakening of our national economy.¹⁰¹

As discussed previously (in Section V), Commerce has stated that imports impair national security under its “economic welfare” analysis if it determines imports actually “threaten the *viability* of U.S. industries and resources needed to produce domestically goods and services necessary to ensure U.S. national security.”¹⁰² Commerce has explained that the inquiry under Section 232 is not whether a domestic industry itself is threatened by imports, but whether imports threaten the ability of the domestic industry to meet the needs of the defense industry:

*The issue whether imports have harmed or threaten to harm U.S. producers writ large is beyond the scope of the Department’s inquiry, and need not be resolved here. Under Section 232, the Department is authorized only to determine whether imports fundamentally threaten the ability of domestic producers to satisfy the United States’ national security requirements. . . . Accordingly, while the Department makes no finding as to whether U.S. producers are being harmed by imports, it finds that there is no evidence that imports threaten the viability of U.S. producers so fundamentally as to threaten to impair U.S. national security.*¹⁰³

Thus, the remedy standard for Section 232 investigations is strikingly different from that for U.S. AD/CVD and safeguard proceedings that inquire whether imports are a “significant cause” of “material injury” to the domestic industry (for AD/CVD) or whether imports are an “important cause” of “serious injury” to the domestic industry (for global safeguards).¹⁰⁴ To provide relief under Section 232, Commerce should find that imports threaten the “*viability*” of U.S. producers “*so fundamentally*” as to threaten to impair national security, *i.e.*, Commerce should find that imports’ impact on the domestic industry is so severe that it essentially threatens their ability to supply any of the limited range of critical materials needed by the military and

¹⁰¹ 15 C.F.R. § 705.4.

¹⁰² *See Iron Ore* at 7 (emphasis added).

¹⁰³ *Iron Ore* at 37 (emphasis added).

¹⁰⁴ 19 U.S.C. §§ 1671d(b), 1673d(b), 1677(7) (for AD/CVD); 19 U.S.C. § 2252(b)(1) (Section 201 safeguards).

defense industry. As discussed earlier in this submission, this is a much higher standard than that for other U.S. trade remedy laws, and it requires more than a mere finding of “injury.” Whatever the standard, it is not met in this case.

B. The Overall U.S. Aluminum Industry is Healthy with Increasing Profits, Employment, Innovation, and Investment, and Fully Capable of Supplying U.S. National Security Requirements

As noted in the introduction, the Department must consider the performance of the entire U.S. domestic aluminum industry as a whole – not just the smelters. This also includes the myriad of downstream producers of semi-finished aluminum products. As discussed below, the entire U.S. aluminum industry is healthy and profitable.

1. The Overall U.S. Aluminum Industry Is Profitable

The domestic aluminum industry has recently undergone significant restructuring, undertaken billions of dollars in investment in modernization, and refocused on high value-added and growth sectors. This, in combination with strong demand for automotive aluminum sheet and rebounding aluminum prices, have left U.S. aluminum producers profitable, fundamentally healthy, and fully capable of satisfying national security requirements. This has contributed to additional demand for imports.

First, due to a combination of low prices, high production costs for primary aluminum, and significant increased demand for downstream aluminum, there has been a long-term gradual, and recently accelerating, shift of the U.S. industry to focus on semi-finished and downstream production, which has more value-added and higher growth and where the U.S. industry is thriving, attracting investment, and leading global innovation. Imports of primary aluminum, including those by Rusal, fully contribute to the development of the overall U.S. aluminum industry, including the growth of the downstream sector. This in turn fuels additional demand for imports of primary aluminum, including Rusal’s products.

Specifically, domestic producers have refocused on high value-added and growth sectors, especially the automotive sheet sector. Arconic, Constellium, and Novelis have each made massive investments in developing body-in-white (“BiW”) capabilities to serve the rapidly growing automotive aluminum sheet market. Arconic expanded production capacity at its facilities in Iowa, Pennsylvania, and Tennessee. Arconic also launched a proprietary Micromill™ technology to turn in molten metal into coil in 20 minutes rather than the traditional 20 days, in one quarter of the floor space with half the energy, which produces aluminum alloy that is 40% more formable and 30% stronger than other automotive aluminum.¹⁰⁵ Micromill™ technology debuted in 2016 in the Ford F-150 truck.¹⁰⁶ Constellium also made significant investments in its BiW capacity in the United States, including building a new rolling mill in Georgia that opened in May 2017, expanding existing facilities, and diverting production capacity at its Alabama facility from packaging and aluminum cans to automotive sheet. Novelis operates two automotive sheet-finishing lines in New York which are operating at full capacity and plans to continue diverting production capacity from the container market to the automotive market in the coming years.¹⁰⁷

Second, within the remaining domestic upstream production, just as the domestic steel industry transitioned from vertically-integrated blast furnace (basic oxygen furnace or “BOF”) mills to electric arc furnace (“EAF”) mini-mills, the domestic aluminum industry has also undergone significant transformation of its production operations by moving from fully-vertically integrated primary aluminum smelting operations.

¹⁰⁵ See <http://www.arconic.com/global/en/who-we-are/micromill.asp>.

¹⁰⁶ See *id.*

¹⁰⁷ See **Exhibit 16**, US Aluminum Manufacturers’ Profitability Summary, and **Exhibit 17**, IBIS World report.

Third, over the past few years, the domestic aluminum industry has undergone significant consolidation and restructuring. In 2015, Constellium acquired the assets of Wise Metals for \$1.4 billion, including a large aluminum sheet facility in Alabama, and boosted production at the Alabama facility from 450,000 tons per year to over 700,000 tons. In 2016, Granges acquired Noranda's downstream rolling operations in the United States, broadening its exposure to the automotive sector and doubling Granges' sales volume.¹⁰⁸ Finally, in late 2016, Alcoa Inc. completed its split into two independent companies: (1) Alcoa Corp., which assumed upstream operations including bauxite mining, alumina refining, and primary production; and (2) Arconic Inc., which assumed most of the value-added midstream and downstream operations.

Fourth, U.S. aluminum prices (the Midwest U.S. price) has rebounded, increasing nearly 25% from March 2016 to March 2017:¹⁰⁹

AVERAGE PRICE OF ALUMINUM IN THE UNITED STATES
AND ON THE LONDON METAL EXCHANGE

(Cents per pound)

Period	Midwest U.S. market price	LME cash price Grade A
2016:		
March	77.345	69.409
April	79.274	70.940
May	78.563	70.577
June	79.693	72.204
July	81.036	73.911
August	80.705	74.440
September	78.500	72.107
October	82.476	75.458
November	86.375	78.692
December	86.475	78.483
January–December	80.428	72.746
2017:		
January	89.964	81.210
February	94.375	84.207
March	96.370	86.233
January–March	93.570	83.883

Source: Platts Metals Week.

¹⁰⁸ See Granges 2016 Annual Report, available at: <http://www.granges.com/globalassets/05.-investerare/03.-rapporter-och-presentationer/2017/02.-arsredovisning-2016/granges-annual-report-2016.pdf>.

¹⁰⁹ See USGS Mineral Industry Surveys, Aluminum in March 2017 at 7, available at: <https://minerals.usgs.gov/minerals/pubs/commodity/aluminum/mis-201703-alumi.pdf>.

All of the above has provided a strong and profitable underpinning signaling a healthy and viable domestic aluminum industry. Using available financial data for the U.S. operations of the ten largest U.S. aluminum manufacturers, covering the full range of aluminum production, we provide the below summary of the domestic aluminum industry's profitability going back to 2015:

US Aluminum Manufacturers' Profitability Summary

	(million USD)				Percent/Pt Change	
	2015	2016	1Q 2016	1Q 2017	2015-16	1Q '16-'17
Revenue	28,677	25,960	6,527	6,906	-9.5%	5.8%
Operating income/(loss)	1,653	2,179	608	717	31.8%	18.0%
Operating income margin	5.8%	8.4%	9.3%	10.4%	2.6 pts	1.1 pts

Sources: Financial Statements, Reports, IBIS World, and Pro-Rated/Proxied Estimates for Top 10 US Producers: Alcoa, Aleris, Arconic, Century, Constellium, Granges, Kaiser, Novelis, Reynolds, and Sapa.¹¹⁰

As demonstrated above, following the above restructuring, U.S. aluminum producers' operating income increased 31.8% from \$1.7 billion in 2015 to \$2.2 billion in 2016, and is on pace to increase an additional 18% to reach \$2.9 billion in 2017. In the first quarter of 2017, the domestic aluminum industry operated at a profit margin of over 10%, warranting the following optimism from major aluminum producers:

- Alcoa: “{F}irst quarter 2017 profits grew sequentially on stronger alumina and aluminum pricing and {Alcoa} maintained a solid cash position.” “Alcoa is off to a strong start with our first full quarter as an independent company... {and} increase{d} earnings substantially.”¹¹¹

¹¹⁰ See **Exhibit 16**, U.S. *Aluminum Manufacturers' Profitability Summary*; **Exhibit 17**, IBIS World Report, including supporting documents, back-up data, and calculations.

¹¹¹ See <http://news.alcoa.com/press-release/alcoa-corporation-reports-first-quarter-2017-results>.

- Arconic: “Solid performance, strong net cost reduction and some additional tailwinds allowed Arconic to deliver a stronger than anticipated first quarter of 2017.” “Arconic ended the first quarter of 2017 with cash on hand of \$2.6 billion.”¹¹²
- Constellium: “Expect high single-digit growth in Adjusted EBITDA annually over the next three years, leading to over €500 million in 2020.”¹¹³
- Granges: “Strong sales and operating profit in the first quarter.” “Continued good development in all our regions during first quarter.” “Strengthening the organization within research and innovation.” “The US facilities are operating close to maximum capacity.”¹¹⁴
- Kaiser: “Announces Quarterly Dividend Payment and \$100 Million Increase in Share Repurchase Authorization.”¹¹⁵ “Solid Demand...Drove Higher Sales.” “Overall, we achieved solid first quarter results.”¹¹⁶
- Novelis: “Operational efficiencies and strategic product shift drive record results and automotive shipments.” “This year’s record performance provides us with a blueprint for sustainable results and the strategic flexibility to enhance our leadership position in the industry.”¹¹⁷
- Sapa: “Broad-based profit growth for Sapa in Q1.”¹¹⁸

2. The Domestic Aluminum Industry’s Production Capacity, Employment, Investment, and Innovation are Strong and Improving

Every single “economic welfare” factor that Commerce considers in Section 232 investigations – domestic production capacity, employment, investment, specialized skills, and government revenue – have improved for the domestic aluminum industry as a whole, demonstrating its overall health and ability to fully supply all national security requirements.

¹¹² See http://www.arconic.com/global/en/news/news_detail.asp?pageID=20170425000402en&newsYear=2017.

¹¹³ See First Quarter 2017 Earnings Call (Apr. 27, 2017), available at: <http://www.constellium.com/aluminium-company/finance/financial-results-and-presentation/investor-presentations>.

¹¹⁴ See Granges Interim Report January-March 2017, available at: <http://www.granges.com/globalassets/05.-investerare/03.-rapporter-och-presentationer/2017/03.-q1-2017/granges-interim-report-jan-mar-2017.pdf>.

¹¹⁵ See <http://investors.kaiseraluminum.com/releasedetail.cfm?ReleaseID=1021546>.

¹¹⁶ See http://files.shareholder.com/downloads/KALU/4609711123x0x938090/C905755B-B9A4-4442-8DCA-6B6169EA2117/2017Q1_Earnings_Release_v0419_Final.pdf.

¹¹⁷ See “Novelis Reports Record Fourth Quarter and Full Fiscal Year 2017 Results,” (May 10, 2017), available at <http://novelis.com/investors/#News-Releases>.

¹¹⁸ See <https://www.sapagroup.com/en-GLOBAL/media/press-releases/broad-based-profit-growth-for-sapa-in-q1/>.

First, as discussed in detail above in Section V, the domestic industry easily satisfies national defense requirements for high purity aluminum as well as all other aluminum products.

Second, despite increased automation, technology developments, and production process modernization, domestic aluminum industry employment has remained robust and in fact increased since 2013. According to the Aluminum Association, U.S. aluminum industry direct employment has increased from 156,744 employees in 2013 to 160,888 employees in 2016, for an increase of 3 percent.¹¹⁹ That includes increases in each major sector except for alumina refining and primary aluminum, which as discussed above is primarily due to the industry move from primary production to secondary production, the latter of which is more efficient, as well as focusing on higher value-added semi-finished and downstream production. Direct U.S. aluminum industry employees earn more than \$12 billion in annual wages.¹²⁰ When supplier and related employment are included, the domestic aluminum industry supports 713,000 U.S. jobs, \$34 billion in wages and benefits, and \$186 billion in economic impact representing more than 1 percent of the total U.S. gross domestic product.¹²¹ With average wages of over \$74,500 per employee, well over the national average, many of these jobs are highly skilled positions, requiring advanced education and training.

Third, a key ingredient to the domestic aluminum industry's restructuring and resurgence has been healthy investment in new facilities, technologies, and high value-added products, as discussed above. The Aluminum Association estimates that since 2013, the domestic aluminum

¹¹⁹ See **Exhibit 27**, ("Aluminum Country: Impact on U.S. Manufacturing," Aluminum Association.

¹²⁰ See *id.*

¹²¹ See *id.*

companies have announced domestic plant expansions and planned investment totaling more than \$2 billion to meet anticipated growth for aluminum in the automotive sector alone.¹²²

Finally, the increased profitability, employment, wages, and investment of the domestic aluminum industry – combined with increased aluminum imports – have significantly increased government revenue generated from the aluminum industry.

B. The Domestic Industry Focuses on Semi-Finished and Downstream Production and Relies on Imports for Non-National Security Demand

1. Domestic Primary Aluminum Smelting Capacity Has Been Contracting for 35 Years Due to Low Prices and High Costs

Since 1980, when the last new U.S. aluminum primary smelter was commissioned, *and long before significant primary aluminum import volumes*, domestic primary smelters have been closing due to low prices and high costs (labor, power, efficiency/maintenance costs).¹²³ Since 1980, twenty-six U.S. smelters have permanently closed, two are currently idled, and five are currently still operating.¹²⁴ As a result, annual U.S. primary smelting capacity has fallen from over 5 million tons in 1980 to just over 1 million tons in 2017:

¹²² *See id.*

¹²³ *See* CRU I Executive Summary, appended as **Exhibit 1**.

¹²⁴ The five U.S. primary smelters currently in operation are located in Massena West, New York (Alcoa); Ferndale, Washington (Alcoa); Hawesville, Kentucky (Century); Sebree, Kentucky (Century); and Mt. Holly, South Carolina (Century). *See Exhibit 17* at IBIS World Report.

Source: CRU I at 1, appended as **Exhibit 1**.

The waves of smelter closures in the U.S. have nothing to do with imports. Rather, the closures have been driven largely by the high costs of U.S. smelting operations, including particularly high energy costs associated with outdated and older U.S. smelters.¹²⁵ During the period from 2000 until the present time, most industrial countries have optimized costs by investing in the development of the energy sector that resulted in the gradual reduction of their power tariffs. The United States has not followed this policy. As a result, the U.S. industry had to shift to more value-added downstream production that led to the closure of most smelters that produced primary aluminum, as electricity rates constitute 30% to 40% of a smelter's cost structure.¹²⁶

Source: CRU Benchmark Data.

¹²⁵ See *id.* at 1-2; see also **Exhibit 23**, AMM *Power Rates Drive US Aluminum Industry's Future* (Mar. 31, 2016) available at <http://www.amm.com/Article/3541758/Power-rates-drive-US-aluminum-industrys-future.html>.

¹²⁶ Exhibit 23, <http://www.amm.com/Article/3541758/Power-rates-drive-US-aluminum-industrys-future.html>

In this regard, one of the most important aspects of aluminum smelting is access to abundant and cheap energy. Most U.S. smelters simply do not have access to low cost energy. Rather, the majority of shuttered U.S. aluminum smelters were powered by higher cost coal fired electricity plants.¹²⁷

Newer smelting operations have moved toward more efficient hydro-powered production.¹²⁸ This has been a trend in the aluminum industry “for the past 20 years.”¹²⁹ Many U.S. smelters have not made the transition to more efficient energy sources despite the fact that newer smelting operations abroad have already done so. In fact, 90% of Rusal’s aluminum products are manufactured using cost-effective hydroelectric power plants, a clean and cost-effective energy source.¹³⁰ As part of restructuring and cost reduction efforts, Rusal has closed its inefficient primary aluminum production facilities in Russia that consume power mostly from coal-fired power plants. These closures represented about 15% of Rusal’s total smelting capacity.

Producers in Canada and the Middle East enjoy similar comparative cost advantages based on access to lower-cost energy.¹³¹ Many U.S. companies have invested in newer low-cost smelting operations in Australia, Canada, Brazil, Iceland and the Arabian Gulf.¹³² Many foreign suppliers now have a genuine competitive advantage over U.S. producers in terms of energy sources. This is significant, given that energy costs comprise a substantial portion of total smelting costs.

¹²⁷ See **Exhibit 2**, CRU II at 24.

¹²⁸ See **Exhibit 23**.

¹²⁹ *Id.*

¹³⁰ See **Exhibit 18**, Rusal Section 332 Submission to ITC *Re: Aluminum: Competitive Conditions Affecting the U.S. Industry* (Sept. 12, 2016) at 2, 18.

¹³¹ See **Exhibit 2**, CRU II at 24.

¹³² **Exhibit 1**, CRU I Executive Summary at 2.

As U.S. primary smelter capacity declined, imports increased to meet demand for downstream production:



Source: CRU II at 8, appended as **Exhibit 2**.

Thus, as CRU explains, [

] ¹³³

As a result of its turn to high value-added products, the domestic aluminum industry now heavily focuses on downstream production. There has also been a shift towards recycling/secondary production. According to CRU, [

] ¹³⁴

¹³³ *Id.* at 3.

¹³⁴ *Id.* at 5.

Source: CRU II at 15, appended as **Exhibit 2**.

Though secondary aluminum production is increasing in the United States, it is not keeping up with the increase in downstream demand. Thus, continued growth in primary aluminum imports is required.¹³⁵

2. The Much Larger Downstream Sector of the Domestic Industry Is Thriving

Given that the domestic downstream aluminum industry is ten times larger than the domestic primary aluminum industry, the trends discussed above for the overall domestic aluminum industry are nearly identical for the downstream sector. The summary of profitability provided below covers the largest eight downstream U.S. aluminum producers:

Semi-Finished and Downstream US Aluminum Manufacturers' Profitability Summary

	(million USD)				Percent/Pt Change	
	2015	2016	1Q 2016	1Q 2017	2015-16	1Q '16-'17
Revenue	24,031	23,276	6,064	6,230	-3.1%	2.7%
Operating income/(loss)	1,698	2,233	592	664	31.5%	12.1%
Operating income margin	7.1%	9.6%	9.8%	10.7%	2.5 pts	0.9 pts

¹³⁵ *Id.* at 3-4.

Sources: Financial Statements, Reports, IBIS World, and Pro-Rated/Proxied Estimates for Top 8 downstream US Producers: Aleris, Arconic, Constellium, Granges, Kaiser, Novelis, Reynolds, and Sapa.¹³⁶

Before this year, there was only one petition for AD/CVD relief from imports of flat-rolled aluminum products. Specifically, in 2003, the domestic aluminum plate industry last sought AD/CVD relief from imports from South Africa.¹³⁷ However, the International Trade Commission determined that such imports did not materially injure or threaten the domestic industry (again, under the much less stringent standard used in AD/CVD proceedings). As described above, the major U.S. flat-rolled aluminum producers are performing very well, with many projected to generate double-digit profit margins. In April 2017, domestic aluminum foil producers filed AD/CVD petitions on imports from China. The ITC made an affirmative preliminary determination and the investigations are pending before Commerce.¹³⁸

Further downstream from flat-rolled aluminum, the domestic aluminum extrusion industry sought and received AD/CVD relief regarding imports of aluminum extrusions from China in 2011.¹³⁹ The ITC recently extended that relief for another five years.¹⁴⁰

Even the domestic aluminum extrusion and foil industries, however, are profitable and fully capable of satisfying national security requirements, as explained below.

(i) **Aluminum Extrusions**

With the AD/CVD orders on Chinese imports in place, the domestic aluminum extrusion industry has recorded increases in nearly all performance factors from 2013 to 2015:

Domestic Aluminum Extrusion Industry Production, Sales, and Employment¹⁴¹

¹³⁶ See **Exhibit 16 and 17** for supporting documents, backup data and calculations.

¹³⁷ See *Certain Aluminum Plate from South Africa*, Inv. 731-TA-1056 (Final), USITC Pub. 3734 (Nov. 2004).

¹³⁸ See *Aluminum Foil from China*, Invs. 701-TA-570 and 731-TA-1346 (Preliminary), USITC Pub. 4684 (May 2017).

¹³⁹ *Aluminum Extrusions from China*, Invs. 701-TA-475 and 731-TA-1177 (Final), USITC Pub. 4229 (May 2011).

¹⁴⁰ *Certain Aluminum Extrusions from China*, Invs. 701-TA-475 and 731-TA-1177 (Review), USITC 4677 (Mar. 2017).

	Percentage Increase from 2013 to 2015	2015 Data
U.S. Demand	16.6	1.5 million ST
Production Capacity	4.8	1.7 million ST
Production	13.3	1.1 million ST
U.S. Sales (quantity)	15.0	\$1.3 billion
Production Workers	11.1	15,201
Hours Worked	13.7	31.6 million
Wages Paid	19.9	\$725 million

This has led to significant improvements in the domestic industry's performance:

Domestic Aluminum Extrusion Industry Financial and Investment Data¹⁴²

	Percentage Increase from 2013 to 2015	2015 Data	Percentage of Net Sales
Gross Profit	19.9	\$512 million	10.3
Operating Income	4.8	1.7 million ST	4.7
Net Income	13.3	\$203.2 million	4.1
Capital Expenditures	40.6	\$174.6 million	3.5
R&D Expenses	24.0	\$43 million	0.9
Total Net Assets	22.1	15,201	2.0 (asset turnover)
Average Operating Return on Assets	5.5	9.6	N/A

The above snapshot is not of an industry segment that lacks the capability or capacity to satisfy any national security requirements there may be for extrusions, but one that has been revitalized through the use of AD/CVD orders.

¹⁴¹ *Id.*

¹⁴² *Id.* at III-16-17 and Table C-1.

(ii) Aluminum Foil

Although the much smaller domestic aluminum foil industry is in the midst of seeking AD/CVD relief, it remains profitable and fully capable to satisfy any national security requirements there may be for foil, despite increased imports:

Domestic Aluminum Foil Industry Production, Sales, and Employment¹⁴³

	Percentage Increase/Decrease from 2015 to 2016	2016 Data	Percentage of Net Sales
U.S. Demand	4.4	662,391 ST	N/A
Production Capacity	0.0	580,806 ST	N/A
Production	2.8	468,940 ST	N/A
Productivity	5.5	128.4 ST/1,000 hours	N/A
U.S. Sales (quantity)	2.1	447,711 ST	N/A
Net Sales (value)	1.9	\$1.2 billion	100
Gross Profit	108.0	\$89.4 million	7.5
Operating Income	N/A	\$37.2 million	3.1
Net Income	5.4	\$22.0 million	1.8
Capital Expenditures	51.2	\$27.8 million	2.3

C. Aluminum Imports Do Not Negatively Impact the U.S. Aluminum Industry

Assuming, *arguendo*, that the entire domestic aluminum industry is found to be essential to national security (which clearly it is not for the reasons discussed previously), aluminum imports do not negatively impact or threaten impairment of the overall economic welfare of the U.S. aluminum industry. There is no correlation, much less causation, between aluminum import volumes or prices and the overall domestic aluminum industry's performance or condition. Aluminum imports have increased annually since 2010, though the domestic aluminum industry has performed well in certain of those years and poorly in others. Most recently, however,

¹⁴³ *Aluminum Foil from China*, Invs. 701-TA-570 and 731-TA-1346 (Preliminary), USITC Pub. 4684 (May 2017) at VI-7 and Table C-1.

imports have increased and domestic industry performance has improved: aluminum imports have reached the previous peak levels of 2005, while the domestic industry is revitalized, modernized, and recording significant profits (*see above* at II.B.1). Specifically, aluminum import volumes increased 18.5% from 2015 to 2016 and are on pace to increase another 26% in 2017, yet the domestic industry’s operating income increased by 31.8% from 2015 to 2016 and is projected in to increase another 18% in 2017.¹⁴⁴

	2015-2016	1Q 2016-1Q 2017
Increase in Aluminum Imports	18.5 percent	26 percent
Increase in Domestic Operating Income	31.8 percent	18.0 percent

As discussed above, the domestic aluminum industry has also improved and secured employment, developed specialized skills, and improved government revenues – all despite imports. Thus, any prior poor performance experienced by the domestic aluminum industry is not due to imports but due to outdated and expensive production methodologies, not focusing on the most profitable sectors, and market conditions other than imports such as very high energy costs that have contracted domestic primary capacity.

Unlike the domestic steel industry, which has sought protection from imports in the form of hundreds of AD/CVD orders, the domestic primary aluminum industry has not sought AD/CVD relief since 1981 and 1973 – since before its 35 year contraction. In both such instances, the ITC and its predecessor U.S. Tariff Commission found the domestic aluminum industry was not injured or threatened by aluminum imports.¹⁴⁵ In April 2016, the United Steelworkers (“USW”) filed a global safeguard petition under Section 201 of the Trade Act of 1974 for trade relief from imports of primary unwrought aluminum. That Section 201 petition,

¹⁴⁴ See **Exhibit 16** (Profitability Summary) and (Import Data).

¹⁴⁵ See *Aluminum Ingot from Canada*, Inv. AA1921-121, TC Pub. 602 (Aug. 1973); *Secondary Aluminum Alloy in Unwrought Form from the United Kingdom*, Inv. 731-TA-40 (Preliminary), USITC Pub. 1143 (May 1981).

however, was withdrawn one week after it was filed, indicating that the domestic industry beyond the USW did not support the petition or safeguard relief, presumably because they did not feel injured or threatened by imports. Thus, imports have never been found to injure the domestic primary aluminum industry, even under the less stringent standards in AD/CVD and safeguard investigations. As explained in detail below in Section VII, *import restrictions on primary aluminum would only make downstream production more expensive and less competitive*, without improving the competitiveness of domestic primary production. Import restrictions on primary aluminum would also trickle down the supply chain to negatively impact U.S. end-users, including the defense industry, as well as the overall national economy.

Source: CRU II at 21, appended as **Exhibit 2**.

The cost of any restrictions on imports of primary aluminum would be passed through to the price of primary products (ingots, billets, slabs, PFAs and rods), as imported aluminum would constitute the bulk of the supply of primary aluminum. Any tariff would increase the cost of raw material for semi-fabricators. Semis producers would need to pass through this cost increase in their prices. Ultimately, the competitiveness of U.S. semis producers in relation to

semis imports would be reduced. Other things being equal, imports would gain market share from domestic production of semis.

Accordingly, the overall U.S. aluminum industry has restructured and modernized, is profitable, and capable of meeting all national security requirements. Moreover, given the U.S. aluminum industry's demand for primary aluminum (roughly two thirds of U.S. aluminum imports are unwrought) and the U.S. economy's demand for many specialty finished aluminum products, any import restrictions imposed under Section 232 would negatively impact the U.S. aluminum industry, the overall national economy and, thus, impair national security.

VII. SECTION 232 RELIEF IS NOT OTHERWISE APPROPRIATE FOR THE DOMESTIC INDUSTRY

A. The Domestic Industry Already Enjoys Substantial Protection from Imported Aluminum

Commerce's analysis should take into account the fact that the U.S. domestic aluminum industry already enjoys strong and substantial protection from existing or pending trade remedy measures affecting Chinese aluminum imports. As already noted above, Commerce issued antidumping ("AD") and countervailing ("CVD") duty orders on aluminum extrusions from China in 2011.¹⁴⁶ Since then, Commerce has imposed very high AD margins for Chinese aluminum extrusion exporters ranging from 33% to 65%. Commerce has also imposed CVD duties on Chinese exporters ranging from 8% to 374% *ad valorem*.

1. Very High AD/CVD Duties Already Broadly Constrain Many Different Types of Chinese Extrusions

Importantly, the scope of the AD and CVD orders is very broad and comprehensive. It uses an expansive definition of the term "aluminum extrusions" which includes a multitude of

¹⁴⁶ See, e.g., *Aluminum Extrusions from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 18524 (Apr. 4, 2011).

various shapes and forms of such merchandise (*i.e.*, hollow profiles, other solid profiles, pipes, tubes, bars, and rods), including those with various finishes (coating, surface treatments) and/or types of fabrication (cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun).¹⁴⁷ The scope also covers a wide range of imports of further-processed aluminum products, such as fence posts, electrical conduits, door thresholds, carpet trim, heat sinks, window frames, door frames, solar panels, curtain walls, furniture, and many more. Thus, the orders are quite broad in scope and cover many different types of products, ranging from semi-finished goods to finished products.

Imposition of these AD and CVD orders has had a dramatic effect on imports of aluminum extrusions from China since 2012. During the five-year sunset review of these orders, the ITC observed that Chinese aluminum imported into the United States “decreased by 37.6 percent from 2013 to 2015”, while “the quantity of U.S. producers’ production of aluminum extrusions increased” during the same period.¹⁴⁸ The charts below from the Commission’s report demonstrate this trend.

U.S. Producers’ Capacity and Production

Table III-3¹⁴⁹

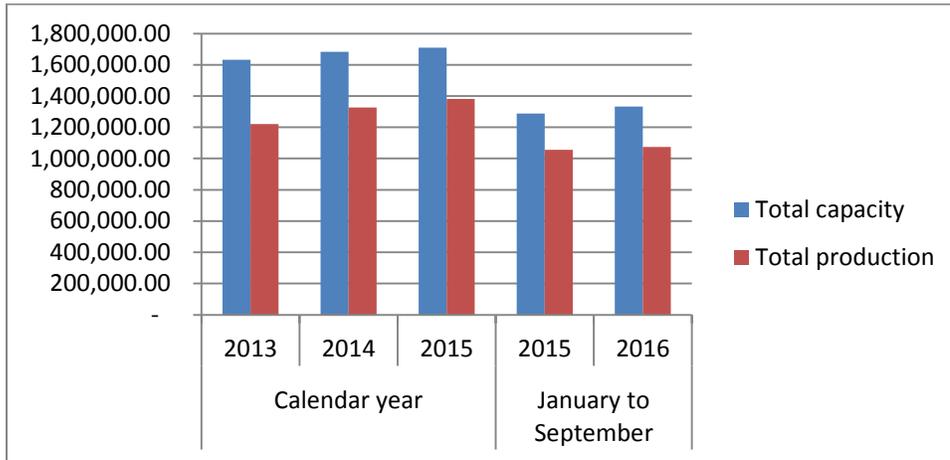
Aluminum extrusions: U.S. producers' capacity, production, and capacity utilization, 2013-15, January to September 2015, and January to September 2016

	Calendar year			January to September	
	2013	2014	2015	2015	2016
Total capacity	1,631,243.00	1,682,077.00	1,709,753.00	1,288,358.00	1,332,941.00
Total production	1,220,407.00	1,326,825.00	1,382,446.00	1,054,863.00	1,074,316.00

¹⁴⁷ *See id.*

¹⁴⁸ *See Certain Aluminum Extrusions from China*, Inv. Nos. 701-TA-475 and 731-TA-1177 (Review), ITC Publication 4677, at IV-2 (Mar. 2017).

¹⁴⁹ *Id.* at III-5.

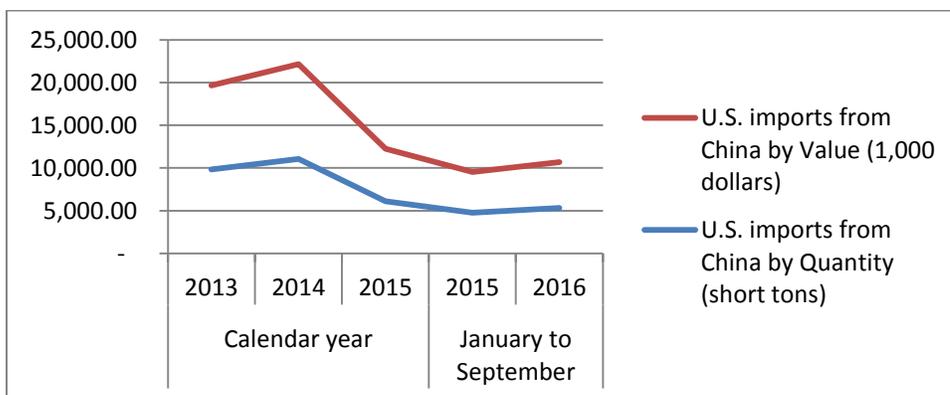


U.S. Imports from China

Table IV-1¹⁵⁰

Aluminum extrusions: U.S. imports, by source, 2013-15, January to September 2015, and January to September 2016

	Calendar year			January to September	
	2013	2014	2015	2015	2016
	Quantity (short tons)				
U.S. imports from China	9,824.00	11,068.00	6,127.00	4,772.00	5,343.00
	Value (1,000 dollars)				
U.S. imports from China	9,824.00	11,068.00	6,127.00	4,772.00	5,343.00



¹⁵⁰ *Id.* at IV-3.

2. Prohibitively High AD/CVD Duties Will Also Be Imposed Soon Against Unfairly Traded Chinese Foil Exports

Commerce is currently conducting yet another AD and CVD investigation of an aluminum product from China – this time it is aluminum foil. This product is used primarily in a wide variety of consumer applications such as food preparation and preservation. The scope includes all imports of aluminum foil from China that are less than 0.2 mm in thickness (less than 0.0078 inches) in reels weighing more than 25 pounds regardless of width and that is not backed, etched for use in capacitors, or cut to shape.¹⁵¹ The specific uses include household foil, flexible and semi-rigid cookware, and product packaging, among other common uses. The domestic industry has alleged AD margins ranging from 38% to more than 134% of the value of the imported foil. The CVD petition alleges that Chinese producers benefit from 27 separate government subsidy programs.

The preliminary AD and CVD determinations will be issued by Commerce very soon (*i.e.*, likely in June and August). While we do not yet know the actual AD and CVD rates, it is very likely that Commerce will issue very high AD and CVD rates to many Chinese exporters because China is treated as non-market economy (“NME”) country. China’s NME status will effectively cause many Chinese companies to receive very high AD/CVD rates if they did not participate to seek or qualify for “separate rates.” If so, this would effectively cut off a substantial portion of Chinese exports.

3. These Two AD/CVD Orders Protect the Domestic Industry from a Substantial Amount of Imports

Thus, the breadth of these AD and CVD orders and proceedings has already provided substantial protection to various sectors of the U.S. aluminum industry. As China is the main

¹⁵¹ See *Certain Aluminum Foil from the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation*, A-570-053, 82 Fed Reg. 15691 (Mar. 30, 2017).

problem in the global aluminum industry (including overcapacity, dumping, subsidies, *etc.*), these existing AD/CVD orders and pending proceedings already provide (or will soon provide) significant protection from the harmful impact of its exports. There is no need for additional protection now from this Section 232 proceeding, which would potentially impose additional unwarranted restrictions against fairly-traded non-Chinese imports that are not harming the domestic industry at all, much less threatening national security. Doing so would needlessly impose additional restrictions on these same products against those engaging in fair trade.

B. Relief Would Not Address the Fundamental Underlying Problems in the Industry Regarding High Energy Costs and Investment Needs

As discussed above in Section VI, the overall domestic aluminum industry is healthy and fully capable of meeting all national security requirements. U.S. smelters have been closing for the past 30 years primarily due to the higher cost of their older smelting operations. Imports did not cause this problem. Rather, imports actually filled the void created by the closure of these older, outdated and inefficient smelting operations.¹⁵² Any effort by Commerce to restrict imports will not solve this basic fundamental structural problem of the U.S. smelting industry. U.S. smelters will still face the high cost of their inefficient operations, regardless of any restrictions imposed on imports. Restricting imports will simply cut off a supply of aluminum that is needed by many U.S. end-users and customers, including most domestic producers of various semi-finished and downstream aluminum products, as discussed below.

C. Relief Would Needlessly Harm Various Sectors of the U.S. Economy, Including Various Downstream End-Users and Customers who rely on imported aluminum

Commerce should recommend against imposing restrictions against aluminum imports. Any such relief would fundamentally harm many sectors of the U.S. economy that rely on

¹⁵² See *e.g.*, **Exhibit 2**, CRU II at 7-8.

imports for their various needs. The simple truth is that U.S. aluminum producers cannot supply all of the primary aluminum that is required as an input to produce all semi-finished and other aluminum that is required by U.S. consumers. This includes downstream producers of semi-finished aluminum as well as ultimate consumers of finished product, such as the automotive industry and national defense industry. Thus, any restrictions would needlessly harm various sectors of the U.S. economy without actually benefitting U.S. producers. We discuss this below.

1. Imports Provide a Vital Supply of Primary and Semi-Finished Goods Needed by Downstream U.S. Producers

The relevant regulations specify that Commerce shall consider “any other relevant factors” including any other factors that may cause “a weakening of our national economy.”¹⁵³ Commerce should consider the fact that imported aluminum products play a critical role in strengthening the economy by providing a vital supply of primary aluminum used to produce downstream semi-finished aluminum in the U.S.

This is readily apparent when imports are viewed from a broader perspective in terms of total domestic production and consumption of primary and semi-finished aluminum. With regard to *primary* aluminum, total U.S. domestic consumption of all primary aluminum amounted to approximately [] million tons in 2016, which is expected to increase annually by about 2.3% to more than [] million tons in 2025.¹⁵⁴ Yet, total domestic production of primary aluminum amounted to only about [] thousand tons in 2016, which is only about 16% of total consumption.¹⁵⁵ Thus, without imports, there would have been a massive shortage in the primary market of nearly [] million tons in 2016. Imports helped fill this gap.

¹⁵³ See 15 C.F.R. § 705.4(a)(5) and (b)(3).

¹⁵⁴ See **Exhibit 1**, CRU I Executive Summary at 4.

¹⁵⁵ See *Id.*

Importantly, imports of such primary aluminum help satisfy the ever-increasing downstream demand for such aluminum by U.S. producers of semi-finished aluminum products. U.S. production of semis now dwarfs production of primary aluminum, accounting for more than ten times the total production of primary aluminum.¹⁵⁶ Total U.S. production of semi-finished aluminum amounted to [] million tons in 2016, and it is projected to grow steadily by an additional [] million tons over the next ten years.¹⁵⁷ This constant growth in production of semis requires additional input of primary aluminum, which the domestic industry simply cannot provide.¹⁵⁸ Moreover, imported primary aluminum is generally more energy efficient than local domestic U.S. produced primary aluminum.¹⁵⁹

It is important to note, that even if Canada were granted duty free status in case of imposition of tariff on primary imports, and even assuming that all Canadian capacity was destined for the US market, there would still be a large need for primary imports from other countries, ranging from 1.5 to 1.8 million tons a year.¹⁶⁰

¹⁵⁶ See **Exhibit 1**, CRU I Executive Summary at 4-5.

¹⁵⁷ See **Exhibit 2**, CRU II at 12-13.

¹⁵⁸ It is important to note that, even if Canada were granted duty free status in case tariffs are imposed on primary imports, and even assuming that all Canadian capacity was destined for the U.S. market, there would still be a large need for primary imports from other countries, ranging from 1.5 to 1.8 million tons per year. See Exhibit 1, CRU I Executive Summary at 7.

¹⁵⁹ This despite the fact that the energy efficiency of total U.S. GDP increased over the past 36 years from 12.1 thousand BTU per dollar in 1980 to 5.85 thousand BTU per dollar in 2016 (in 2009 dollars). See https://www.eia.gov/energyexplained/?page=us_energy_home#tab3.

¹⁶⁰ See **Exhibit 1**, CRU I Executive Summary at 7

Source: CRU II at 20, appended as **Exhibit 2**.

From an overall U.S. economic perspective (including U.S. job growth), this is particularly important because U.S. production of semi-finished aluminum accounts for about 95% of all semi-finished aluminum consumed in the U.S.¹⁶¹ In addition, production of semi-finished aluminum is much more labor-intensive than production of primary aluminum through smelting. Given the much larger volume of U.S. semi-finished material (as compared to primary) produced in the U.S., and the greater need for domestic U.S. labor to produce semis, production of semi-finished aluminum in the U.S. now accounts for approximately 74% of all U.S. jobs in the aluminum industry.¹⁶² By contrast, production of primary aluminum in the U.S. accounts for only about 3% of all jobs in the aluminum industry.¹⁶³

Thus, it is important that U.S. producers of semi-finished aluminum have continued ready access to imports of primary aluminum to ensure they can obtain the raw materials they need, which are critical to their ability to produce semi-finished aluminum demanded by other downstream producers of finished goods. Restriction of such imports would be highly disruptive to the U.S. economy, including to those workers dependent on the semi-finished sector for their jobs. Moreover, these semi-finished goods (and downstream finished goods) are subsequently supplied to the military and defense industry. Imports of primary aluminum are vital to downstream producers that rely on imports to remain competitive and to produce the semi-finished goods supplied to the military and defense industries. Without continued access to imported primary material, U.S. producers of semi-finished goods would simply be unable to produce the finished aluminum materials ultimately supplied to the military and defense

¹⁶¹ *See id.* at 15.

¹⁶² *Id.*

¹⁶³ *Id.*

department. If there had been import protection imposed on imports of primary aluminum previously, downstream producers would be less competitive today, and they would have reduced production.

Indeed, a recent study of the downstream aluminum sector in the EU demonstrates that existing EU import tariffs on primary aluminum in such a market (*i.e.*, where downstream semis producers rely heavily on imported primary aluminum) would be highly adverse, tightening supply and needlessly increasing costs.¹⁶⁴ The study noted that “{t}he key consequence of import tariffs on unwrought aluminium currently in force in the EU is to inflate market prices for both primary and secondary aluminium.”¹⁶⁵ In this regard, CRU estimated that a 10% tariff on imported primary aluminum in the U.S. would simply increase the price of aluminum in the U.S. by 10%, in much the same way that existing EU tariffs have increased aluminum prices in the EU.¹⁶⁶

For these reasons, Commerce should recommend against any form of relief for the domestic aluminum industry, either in the form of quotas or tariffs.

2. Commerce Should Carefully Consider Any Testimony of Various U.S. Consumers on this Issue at Its Upcoming Hearing

Commerce should carefully consider the comments of all downstream users and consumers of various aluminum products in this case. In particular, Commerce should consider the views of those who rely on imported primary aluminum as an input to manufacture downstream semi-finished products. Such customers and end-users will undoubtedly discuss their needs at Commerce’s upcoming hearing, and in written comments.

¹⁶⁴ See, e.g., “*The Impact of EU Policies on the Competitiveness of the EU Aluminium Industry*” *A Focus on Non-Integrated Downstream Users*; Libera Universtita Internazionale Degli Studi Sociali “Guido Carli” (Rome, December 2014), appended as **Exhibit 19**.

¹⁶⁵ *Id.* at 173.

¹⁶⁶ See **Exhibit 1** CRU I Executive Summary at 7.

VIII. ALUMINUM IMPORTS FROM RUSSIA DO NOT THREATEN NATIONAL SECURITY

Aluminum imports from Russia do not threaten national security. As will be discussed below, Russia does not ship any aluminum used for national defense purposes. Russia mostly ships commercial grade aluminum that is important to various downstream users. Moreover, Russian imports have remained steady and represent a relatively small share of the total U.S. market. Finally, production discipline is a key component of Rusal's overall strategy. Faced with excess capacity elsewhere in the world, Rusal has reduced its aluminum capacity by approximately 750,000 tons.¹⁶⁷ Capacity utilization is almost full and almost entirely directed to satisfy the increasing domestic (Russian), EU, and Asian demand, such that imports into the U.S. will not increase in the future. We discuss this below.

A. Rusal Is a Public Company Listed on the Hong Kong Stock Exchange

Rusal is neither state-owned nor subsidized by the Russian government. Rusal is a publicly traded company in Russia and its ordinary shares are listed on the Hong Kong Stock Exchange. Rusal is among the largest producers of primary aluminum and alloys in the world. It is a vertically integrated aluminum producer with core operations in Russia. Rusal's production chain includes bauxite and nepheline ore mines, alumina refineries, aluminum smelters and casting houses, foil mills, and packaging production centers.

Rusal does not receive government assistance, either in the form of subsidized energy or export assistance programs. It pays market tariff rates for power in Russia. As evident from the

¹⁶⁷ Annual reports of UC Rusal for 2011-2015 show decrease in production capacities. *See also* Rusal's submission to the ITC in Section 332 investigation, at p. 8, appended as **Exhibit 18**.

publicly available structure of capital shares, none are owned by the State. The actual structure of the share capital is reflected on the company's website:¹⁶⁸

Shareholders Structure	% of share capital
En+	48.13%
SUAL Partners	15.80%
Onexim	13.70%
Amokenga Holdings*	8.75%
Public Float	13.37%
Management**	0.25%
Total	100%

The Company is managed by hired management. Other than the appointment letters of the Directors and full-time employment contracts, the Company has not entered into any contract with any individual, firm or body corporate to manage or administer the whole or any substantial part of any business of the Company during the last year. The profiles of the Directors, Senior Management, and substantial shareholders interest are detailed in the Annual Report 2016.¹⁶⁹

Neither the Company nor any of its subsidiaries purchased, redeemed, or sold any of the shares during the financial year ended 31 December 2016. No Shares were issued or allotted by the Company during the financial year ended 31 December 2016.¹⁷⁰ Directors' and Chief Executive Officer's interests in shares and in shares of associated corporations of UC RUSAL are also detailed in the Annual Report 2016.¹⁷¹

B. Market Economy Status of the Russian Federation

Although market economy status was generally granted only to WTO members, the Russian Federation's largest trading partners, the U.S. and the EU, have recognized it as a

¹⁶⁸ See http://www.rusal.ru/en/investors/to_shareholders/structure/.

¹⁶⁹ <http://www.rusal.ru/upload/iblock/a6d/2016Annual%20Report%20-%20English%20version.pdf>, Annual Report 2016 at 87-105 ("Rusal Annual Report 2016").

¹⁷⁰ Rusal Annual Report 2016 at 107.

¹⁷¹ Rusal Annual Report 2016 at 166.

market economy country since 2002, before its accession to the WTO.¹⁷² This status was granted by Commerce and the European Commission, both which concluded that the Russian Federation had transitioned to a market economy and undergone tremendous economic changes.¹⁷³

As a market economy, the Russian Government has not intervened in price assessment, controlled the market, regulated tariffs, or given government assistance to its industries. All decisions regarding investment, production, and distribution have been based on the interaction of supply and demand, which determines the prices of goods and services. Acknowledging the strengthening of the Russian economy led industrial countries to cooperate and treat Russia as an equal.

Thus, Rusal and the entire Russian domestic industry compete fairly on the global market without state-ownership or support.

C. Russian Imports Do Not Compete with Domestic Products

Rusal competes in the U.S. market like any other supplier and is driven by global market pricing, logistical costs, regional demand requirements, and quality limitations. Rusal does not compete primarily with U.S. producers for market share, but with offshore suppliers and traders. Canada is the largest import source of aluminum products into the U.S., followed by China, Russia, the United Arab Emirates, Mexico, Bahrain, Argentina, Qatar, South Africa, Germany, Venezuela, Brazil, India and others.

Rusal is a responsible participant in the U.S. market. Many of Rusal's U.S. customers are part of global enterprises for which Rusal's U.S. business forms part of a global strategic

¹⁷² <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32002R1972>; http://europa.eu/rapid/press-release_IP-02-775_en.htm

¹⁷³ <http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm>

relationship with these companies. As an offshore importer, Rusal has its limitations in technology and capability to meet U.S. requirements, but Rusal adjusts to changes in demand. Thus, while not primarily aimed at the U.S. market, Russian imports are important because downstream U.S. industries rely on them. U.S. consumers of Rusal products rely on Rusal's supplies as integral to their operations. Rusal's annual "satisfaction survey" results confirm Rusal's meets U.S. consumer needs.

Russian production facilities are designed to meet customers' specifications and requirements. Rusal prides itself on meeting the needs of the global market and has adapted its technology and sales strategy to meet future demand. The U.S. primary aluminum market, specifically the primary aluminum valued-added product market, is a key component of Rusal's global portfolio and will remain so for the future. Capital investment is made in alignment with specific global alliances and changes within the aluminum industry. Rusal responds to changes in the global aluminum industry as a responsible and reliable supplier. Rusal has supplied the U.S. aluminum industry for over two decades, but always in a professional and equitable manner driven by the prevailing economic conditions.

As discussed above in sections VI and VII, U.S. producers can only satisfy a small portion of the domestic demand for primary products (for example, in 2016, only 15% of domestic demand for HTUS 7601 was satisfied by U.S. producers, whereas 85% came from imports).

Data Set	Country	Units	2012	2013	2014	2015	2016	2017 F
Consumption	USA	kt	[
Production	USA	kt]

Source: CRU June 2017 (fact), May 2017 (forecast 2017)

Canada is the largest import source of aluminum products into the U.S., with a share of 42% of total consumption in 2016 for HTUS 7601, followed by China (15%), and Russia (13%). The void between U.S. production and consumption is huge and can only be filled by imports. Even if U.S. smelters re-opened idled facilities and operated at full capacity¹⁷⁴ and Canada increased its imports by another 442,000 tons¹⁷⁵ (8% of total consumption in 2016), millions of tons of imports from third countries would still be required. The need for imports is expected to increase, as domestic demand in transport, construction, electrical and consumer goods is projected to grow by approximately [] by 2021, according to CRU.¹⁷⁶ Imports from third countries will continue to play an important role in satisfying the domestic demand, with competition occurring primarily between offshore importers rather than between offshore importers and U.S. producers.

Although the U.S. market is a relatively small percentage of Rusal's global sales, the U.S. market is an important market for Rusal because of the reliance of downstream industries on Rusal supplies. Rusal supplies its products to U.S. downstream producers who employ thousands of U.S. workers and contribute to the economic growth of the country. Any Section 232 remedies will render various sectors of downstream aluminum industries uncompetitive, resulting in price increases for end-users.

¹⁷⁴ Idled primary smelters that can be restarted: Century Hawesville (Current Operating Capacity – 100-110 KT; Potential Restart – approx. 100-150 KT); Century – Mt. Holly (Current Operating Capacity – 115 KT; Potential Restart – approx. 115 KT); ARG – New Madrid (formerly Noranda – New Madrid) (Current Operating Capacity – completely idle; Potential Restart – up to 230 KT); Alcoa – Warrick (Current Operating Capacity – completely idle; Potential Restart – up to 270 KT); Alcoa Wenatchee (Current Operating Capacity – completely idle; Potential Restart – up to 150 KT); the remainder of the smelters in the U.S. have been permanently closed.

¹⁷⁵ Canadian International Merchandise Trade Database (<http://www5.statcan.gc.ca/>).

¹⁷⁶ <http://www.rusal.ru/upload/iblock/492/Rusal%20-%20InvCase%20-%20Presentation%20-%20Barcelona%20-%20updated.pdf> at 13.

D. Aluminum Imports from Russia

Rusal sells to the U.S. extrusion billets, primary ingots/t-bars, primary foundry alloys and a small quantity of rolling slab, foil, and wire rod.¹⁷⁷ These same types of products are also supplied to the U.S. by other Russian producers, such as Arconic (Alcoa), KUMZ, and KRAMZ. For example, Arconic (Alcoa) and KUMZ produce and supply to the U.S. market plates, sheet, and strip. KUMZ is a supplier of flat rolled products to Boeing.¹⁷⁸

Below are the data and trends for primary aluminum, wire rod, and foil, the top product types imported from Rusal. According to CRU data for 2016, the U.S. consumption of primary, which includes non-alloyed aluminum and alloys, was [] million tons, which reflects an increase of [] on 2011.¹⁷⁹ Rusal's share of U.S. consumption of primary aluminum has been approximately [] over the last several years.¹⁸⁰ Although total Russian imports of primary unwrought increased somewhat in 2016 due to an improvement in market conditions,¹⁸¹ nevertheless the overall share of Russian imports of primary aluminum remained relatively low overall as a percentage share of U.S. consumption (13%) and total imports (16%).¹⁸²

The stockpiling of ingots from Russia and elsewhere in U.S. warehouses is motivated by market drivers and incentives including:

- current aluminum price levels and U.S. ingot premiums;
- continued low interest rates (albeit, rising ones); and

¹⁷⁷ Rusal exports the following to the United States: unwrought/primary aluminum (HTSUS 7601), foil (HTSUS 7607), and wire (HTSUS 7605). Rusal does not produce or sell plates, sheet, strip (HTSUS 7606), bars, rods, and profiles (HTSUS 7608), pipes and tubes (HTSUS 7608), and other aluminum articles (HTSUS 7616).

¹⁷⁸ http://www.boeing.com/resources/boeingdotcom/company/key_orgs/boeing-international/pdf/russia-cisbackgrounder.pdf at 4.

¹⁷⁹ See CRU Aluminum Monitor 2017 report and CRU and report Imports to the U.S. of HS 76 in 2014-2016 appended as **Exhibit 24** and **Exhibit 25**.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Imports doubled from 2014 to 2016, despite a slight decrease in 2015.

¹⁸² *Id.*

- a natural, structural deficit of primary metal in the U.S. market.¹⁸³

Imports of semi-finished products from Russia are also minor. Aluminum wire rod from Rusal directly sold to consumers in the U.S. was approximately 6,000 tons in 2016, a relatively small portion of the total wire and rod consumed in the U.S.

The share of Russian imports of aluminum foil remains very low. It is only 5% of total imports and only 3.8% of U.S. consumption.¹⁸⁴

At the same time, according to CRU, U.S. consumption of semis is expected to grow steadily, adding over [] million tons in the next 10 years.¹⁸⁵ For example, consumption of household foil in the U.S. [] is expected to increase by [] year-on-year in 2017, and consumption of semi-rigid container foil in the U.S. [] is expected to increase by [] year-on-year in 2017.¹⁸⁶

Therefore, imports of aluminum products from Russia are very small relative to the total U.S. market. However, even these low volumes are overstated because some Russian imports into the U.S. are actually destined for Mexico.¹⁸⁷ According to Rusal's internal sales data, approximately 8% of all Rusal's total sales to North America went to Mexico via the U.S. This means total Russian imports into the U.S. are actually overstated.

¹⁸³ See **Exhibit 2**, CRU II report at 8.

¹⁸⁴ Percentage of Russian imports in 2016 of 7607 in the total consumption of household foil and semi-rigid foil (310,000 tons). See CRU report Global Outlook for Aluminum Foil to 2022 at 49, appended as **Exhibit 26**.

¹⁸⁵ See **Exhibit 2**, CRU II report at 12.

¹⁸⁶ See **Exhibit 26**, CRU report Global Outlook for Aluminum at 49.

¹⁸⁷ Logistics and service factors explain why Russian origin aluminum is sold to Mexico via the U.S. In particular, [

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E. Russian Exports Will Not Increase: Russia Currently Operates at Full Capacity to Satisfy Growing Domestic Demand and Supply Shortfalls in Neighboring Markets

Rusal's total production capacity of aluminum in Russia is 3.7 million tons with almost full capacity utilization (approximately at 95%).¹⁸⁸ Supplying the growing demand of the Russian domestic market is the top priority of Rusal's commercial policy, such that the Russian domestic demand is satisfied first and given priority over exports. At present, the Russian domestic market absorbs approximately 20% of all primary aluminum produced in Russia. The other 80% is exported, primarily to Europe (68%) and Asia (21%), but also to North and South America (11%) and Africa (less than 1%).

According to CRU, Russian production of primary aluminum in 2010-2016 remained stable while consumption grew.

Production:

[]
[]

Consumption:

[]
[]

Source: CRU Report Aluminum Monitor 2017 April Data, appended as **Exhibit 24**.

Consumption of primary aluminum in Russia grew steadily over the past few years. Although declining twice slightly in 2009 and 2014 (due to economic crises), demand picked up again by the end of 2015 and increased in 2016. The projected growth in demand between now

¹⁸⁸ <http://www.rusal.ru/upload/iblock/a6d/2016Annual%20Report%20-%20English%20version.pdf> at 20.

and 2024 is significant: from 1.4 million tons¹⁸⁹ consumption is expected to reach 2 million tons in 2021 and 2.5 million tons in 2024.

Russia has a vibrant and growing consumer market for finished aluminum products. The biggest consumers of aluminum in Russia are the packaging and foil industries. In 2015, 26.8% of aluminum was used in packaging and foil industries, 16.1% in automotive industry, 15.4% in construction, 13.4% in consumer goods, 12.8% in cable industry and the electric segment, 8.7% in machinery and equipment, and 6.7% in ferrous industry.¹⁹⁰

Russia remains one of the world's fastest growing aluminum markets and has potential to further increase its aluminum consumption. Projects stimulating consumption recently launched in Russia include expanding the uses of aluminum in new products, using aluminum as a substitute for other materials, capacity development and localization, changing restrictive legislation, industry standards, codes, promoting exports of semis and finished aluminum products, substituting domestically semis imports:

- In the automotive industry, this translates into the development of new production facilities for production of auto parts, import substitution, revision of localization conditions.
- In construction, those projects include replacement of PVC window frames and promoting the use of aluminum alloys in bridge construction.
- In packaging, the measures include substituting glass and plastic packaging with aluminum packaging, substituting foil imports.
- In transportation, the measures include expanding the use of aluminum in ship building, aviation, railway car production, aluminum drilling pipes.
- In the cable industry, aluminum is used to substitute copper, the use of innovative cables containing aluminum is promoted to stimulate consumption.

Russia's federal strategy of development and modernization for the construction sector is designed to increase the application of up-to-date energy efficient construction materials that

¹⁸⁹ Consumption in Russia including primary, secondary aluminum and import of semis and finished products.

¹⁹⁰ <http://www.rusal.ru/upload/iblock/bd9/RUSAL%20presentation%20Sergey%20Bubnov%20PLATTS%202016%20Jan.pdf> at 7. Consumption of aluminum semis and finished goods by industry.

over the long term will favorably affect aluminum consumption in Russia. The inherent properties of aluminum, including durability, lightness, and resistance to corrosion, allow for an unlimited range of applications in the construction industry.

The Russian automotive industry is rapidly recovering from a decline triggered by the global economic crisis. Russia's auto market is now the second largest in Europe. The need to increase production of automotive components will drive the demand for aluminum alloys. Russian manufacturers of aluminum-containing products are below capacity (due to imported products containing aluminum), which indicates significant growth potential in the Russian aluminum market. The devaluation of the Ruble also led to a decline in demand for imported aluminum-containing products and shifted consumers' buying potential towards domestically produced aluminum products.

As discussed above, it is expected that Russia's consumption of aluminum will very soon grow significantly beyond its current 20% share of total production. Since all capacities work at almost full utilization rates, additional volumes will have to be shifted to Russia from exports. At present, Europe and Asia (Japan and South Korea) are the key export markets for Rusal¹⁹¹ due to the combination of such factors as important aluminum supply deficits in those markets, short lead time, Rusal's strong commercial presence in those markets, and market conditions yielding high profits. For example, the supply deficit in the EU increased by 5 million tons in 2017 alone, as compared to the 1 million tons increase in the supply deficit in the North American market (U.S., Canada and Mexico) over three years. Moreover, as discussed above, the Russian industry is technically oriented to supply primarily its domestic and neighboring markets because Russian

¹⁹¹ [http://www.rusal.ru/upload/iblock/35e/!4Q16%2012M16%20presentation%20\(new%20template\)%20v20.pdf](http://www.rusal.ru/upload/iblock/35e/!4Q16%2012M16%20presentation%20(new%20template)%20v20.pdf) at 8.

production facilities are designed to meet the specifications in their own domestic market, the EU and Asian markets.

Therefore, Russia does not have any spare capacity to increase exports to the U.S. Current Russian capacities are already utilized at 95%. The demand in its own domestic market is expected to grow significantly and almost double in the next five years. The remaining volumes will be directed to the neighboring EU and Asian markets, which are all more attractive than the U.S. market for a variety of reasons explained above and where the deficit is expected to grow significantly in the next five years. Accordingly, Russia will not increase its exports of aluminum to the U.S.

IX. ANY RECOMMENDATION FOR RELIEF SHOULD BE LIMITED TO CHINA

We have documented throughout this submission with substantial evidence and argument that imports of aluminum are not impairing national security. Therefore, the Department should not recommend any relief at all in this case. Nevertheless, should the Department ignore this evidence and wrongly recommend relief, the Department should narrowly tailor any such recommendation to account only for Chinese imports. Chinese imports are really the only category of imports to which the Department may reasonably attribute any potentially adverse impact on the domestic industry. We discuss this below.

A. Chinese Aluminum Imports Are Heavily Subsidized

It is well documented that the Government of China (“GOC”) has broadly subsidized its aluminum industry, allowing it to expand despite global overcapacity and despite the higher cost of aluminum produced in China. This has enabled Chinese producers to ship ever larger volumes of aluminum to the U.S. at very low prices, despite higher costs.¹⁹²

¹⁹² See, e.g., **Exhibit 2** (CRU II Report at 10-11).

The U.S. Government has investigated and documented illegal Chinese subsidies for aluminum since at least 2010, when the Department investigated Chinese subsidies provided to aluminum extrusions from China.¹⁹³ The Department has found extensive illegal subsidies at the central, provincial and/or local level, including: (1) loans, (2) preferential tax policies; (3) assistance with R&D; (4) refunds of value-added taxes (VAT); (5) provision of “funding” or monetary “grants”; (6) Export-Import Credits; (7) tax offsets, *etc.*¹⁹⁴ These are only some of the programs. There are many others. The Department documented that the GOC provided more than 30 different types of such illegal subsidies for “extrusions” since 2010.¹⁹⁵

More recently, in March of 2017, the Department initiated yet another CVD investigation of a Chinese aluminum product, this time involving aluminum foil.¹⁹⁶ In the foil case, the Department is again investigating preferential lending, preferential tax programs, preferential regulatory treatment, grant programs, *etc.* benefiting Chinese aluminum foil producers. As noted earlier in this submission, DOC is likely to find that the GOC is conferring numerous illegal subsidies to the foil sector, hereby providing its foil exporters with an unfair competitive advantage.

Subsidization of the Chinese aluminum industry is now so pervasive that the U.S. Government filed a WTO complaint in January of 2017 alleging a broad range of unlawful

¹⁹³ See, e.g., *Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 Fed. Reg. 18,521 (Apr. 4, 2011), and accompanying decision memorandum; *Aluminum Extrusions From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 Fed. Reg. 106 (Jan. 2, 2014), and accompanying decision memorandum; *Aluminum Extrusions From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 Fed. Reg. 78,788 (December 31, 2014), and accompanying decision memorandum; *Aluminum Extrusions From the People's Republic of China: Final Results, and Partial Rescission of Countervailing Duty Administrative Review; 2013*, 80 Fed. Reg. 77,325 (December 14, 2015), and accompanying decision memorandum; *Aluminum Extrusions from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 81 Fed. Reg. 92,778 (December 20, 2016), and accompanying decision memorandum.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* A list of the extrusion subsidy programs is provided in **Exhibit 20**.

¹⁹⁶ See *Certain Aluminum Foil From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 82 Fed. Reg. 15,688 (Mar. 30, 2017).

subsidies throughout the Chinese aluminum industry.¹⁹⁷ The complaint specifically alleged that the GOC “has been providing subsidies benefitting Chinese producers of primary aluminum over the period 2007 to the present,” including “loans and other financing to primary aluminum producers” in China.¹⁹⁸

B. Chinese Subsidies Have Fueled Over-Capacity and Decreasing Prices

USTR has alleged that Chinese subsidies are “contributing to excess capacity and undercutting American workers and businesses.”¹⁹⁹ In fact, Chinese producers have increased their overall smelting capacity by ten-fold over the last two decades. This means Chinese producers now account for more than 50% of total global smelting capacity for aluminum, a huge increase the 11% share it had in 2000.²⁰⁰

Thus, Chinese imports have clearly benefitted from illegal subsidies provided to the aluminum industry *writ large*, including the entire primary industry, as well as other specific segments of the industry, such as extrusions and foil. The subsidization is rampant and has allowed Chinese exporters to produce and sell ever-larger volumes of aluminum to the U.S. despite higher costs and lower prices. This in turn is widely viewed “as the reason for depressed commodity prices” in aluminum.²⁰¹ Some industry analysts have asserted that “the Chinese

¹⁹⁷ See, e.g., *China – Subsidies to Producers of Primary Aluminum; Request for Consultations by the United States* (WTO/DS519/1) (Jan. 17, 2017).

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., USTR Press Release, *Obama Administration Files WTO Complaint on China’s Subsidies to Aluminum Producers*, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Obama-Administration-Files-WTO-Complaint-China-Aluminum>.

²⁰⁰ See, e.g., Testimony of Tim Reyes, Alcoa Inc. before the USITC *Re: Aluminum Competitive Conditions Affecting the U.S. Industry* (Sept. 29, 2016); see also <http://www.aluminum.org/getting-trade-right>.

²⁰¹ See **Exhibit 23**, *AMM Power Rates Drive US Aluminum Industry’s Future* (Mar. 31, 2016) available at <http://www.amm.com/Article/3541758/Power-rates-drive-US-aluminum-industrys-future.html>.

Government's subsidizing of metal producers has been considered a major driver for nearly all of the ills of the global metals industry" with the "aluminum industry particularly affected."²⁰²

Thus, to the extent there are any problems in the domestic U.S. aluminum industry attributed to imports; Chinese subsidies are clearly the cause. No other producers or exporters from any other significant exporting countries receive such subsidies allowing unfair competition, including Russian producers. Russian producers compete fairly, cleanly, and efficiently. Russian producers are not state owned or operated. They are not subsidized. Russian exporters do enjoy certain cost advantages, but this is based on Russian comparative advantages involving energy and other costs. Russia and all other exporting countries compete fairly, and they should not be lumped together with China.

C. Chinese Exporters Have Captured an Increasing Share of Aluminum Imports – Including Primary Aluminum

China's unlawful subsidization has enabled Chinese producers to ship ever larger volumes of aluminum at lower prices. As Secretary Ross noted in announcing this investigation, U.S. imports of Chinese semi-fabricated aluminum products "grew by 183 percent between 2012 through 2015."²⁰³ China now ranks second in total aluminum exports, surpassed only by Canada.²⁰⁴

Importantly, Chinese imports include a significant proportion of "primary" aluminum. Although official HTSUS import statistics suggest that China has exported only minimal amounts of "primary" or "unwrought" aluminum since 2009, in fact this is not true. Chinese exporters have rampantly misclassified unwrought "primary" exports as finished plates, coils,

²⁰² *Id.*

²⁰³ See *Remarks by Secretary Wilbur Ross at the White House* (Apr. 27, 2017) available at <https://www.commerce.gov/page/section-232-investigation-effect-imports-aluminum-us-national-security#remarks>.

²⁰⁴ See **Exhibit 21**, Ranking of aluminum exports by country.

and extrusions.²⁰⁵ As will be explained below, Chinese exporters engage in these tactics to avoid paying the full 17% Chinese VAT taxes on exports of primary aluminum.

The misclassified goods are sold specifically for the purpose of being “remelted” once it enters the U.S. market. As such, it is used in much the same way as primary aluminum. While it is difficult to confirm the precise amount of such Chinese misclassified material, reasonable estimates suggest that as much as 30% of all Chinese imports are actually comprised of “primary” type of material that is shipped as plate or other finished goods.²⁰⁶

The bottom line is that not only have Chinese exports captured an increasing share of the U.S. market, but they have also captured a relatively large share of all “primary” unwrought materials, and certainly in larger amounts than suggested by current HTSUS import statistics. And, these increasing volumes of imports are subsidized and low priced.

D. Chinese Exporters Have Misclassified Certain “Primary” Aluminum as “Semi-finished” Products to Avoid VAT

The misclassified material includes certain products known commercially as “press scrap” or “semis-remelt,” which may have the appearance of finished aluminium articles (*e.g.*, bars, plates, continuous cast coils, or extrusions) but are more like unwrought aluminium.²⁰⁷ For

²⁰⁵ See <http://www.amm.com/Article/3357701/Aluminicastes-850000T-stockpile-a-concern.html>.

²⁰⁶ See **Exhibit 28**, Source: US ITC DataWeb, available at <https://dataweb.usitc.gov/>. Data on this site have been compiled from tariff and trade data from the U.S. Department of Commerce and the U.S. International Trade Commission. As shown therein, imports of goods from China under 7601 virtually disappear in 2009 from a high of 30.5% in 2005.

²⁰⁷ The products in question are known in the aluminum industry as “press scrap” or “semis-remelt.” Common forms of such products include (a) plates that are flat surfaced rectangular pieces of primary aluminum, with or without rounded corners, not in coils, with a uniform thickness throughout its length of greater than 6.3 mm and less than or equal to 200 mm, (b) bars or rods of primary aluminum that are not in coils, (c) continuous cast coils of primary aluminum, and (d) aluminum extrusions.

example, while these products may have the appearance of plate (or bar or coils with a mill finish) they do not meet the rigid industry standards for plate.²⁰⁸

Such goods should be classified under heading HTSUS 7601 (as true primary “unwrought” materials), but Chinese manufacturers are misclassifying these materials under HTSUS 7604 or 7606, to take unfair advantage of certain VAT rebates at the time of export from China. Goods exported from China under heading 7606 are not subject to export tax and receive a VAT refund (the 17% VAT is reduced to 4%), while goods classified under heading 7601 are subject to an export tax and do not receive a VAT refund. Thus, Chinese producers have a financial incentive to misclassify such “press scrap” and “semis remelt” under heading 7606 (to avoid VAT), when it should actually be classified under heading 7601 (which requires VAT).

The important point is that such “remelt” products are principally sold to be re-melted, perhaps combined with other alloying elements, and further processed (*e.g.*, rolling, forging, extruding, drawing, forging, *etc.*) into final forms. The products are intentionally shipped for remelting, and are not required to meet industry standards for specific downstream applications). As such, the products serve the same purpose as “primary” unwrought forms under HTSUS 7601.

In sum, the misclassified plates, coils, extrusions, and similar forms, commercially referred to as “press scrap” or “semis remelt,” are actually a form of “primary” aluminum and should be considered as such by the Department. Based on available ITC data, we believe that

²⁰⁸ See, *e.g.*, ASTM International Standard B209-14 (“Aluminum and Aluminum-Alloy Sheet and Plate”). For example, the plate products might be “F temper” aluminum. Unlike all other tempers, and aluminum plate that is used in specific applications, F temper plates are not required to be tested for tensile properties, and do not carry any minimum or maximum bounds on properties such as tensile strength, yield strength, or elongation.

such merchandise may account for as much as 30% of the volume of total trade in aluminum between the U.S. and China.²⁰⁹

E. Illegal Capacity in China

A massive amount of the capacity built by Chinese companies does not have proper permits and is actually illegal. On April 12, 2017, the NDRC, MIIT, Ministry of Lands and Resources, and MEP issued a joint regulation “On the work to streamline the situation with illegal projects in the primary aluminum industry.”²¹⁰ The preamble to the regulation states the necessity to take measures to standardize investment in the construction of aluminum projects and to strictly control overproduction. The regulation refers to Order No. 1494 issued in 2015 by the NDRC that prescribes to all new projects being constructed/commissioned after May 2013 without approvals (“illegal projects”) to stop construction, and for those already commissioned – to stop production. According to an estimate by the Chinese analytical agency Aladdiny, the range of illegal capacity in China is estimated between 3.3 million and 5.9 million tons or between 9 and 16% of currently operating smelter capacity in China.²¹¹

X. COMMERCE NEEDS TO ESTABLISH AN EXCLUSION PROCESS

For all the reasons discussed above, Commerce should determine that imports of all aluminum products do *not* threaten national security. We have documented this with substantial legal arguments and factual evidence. Commerce should, therefore, recommend that the President take *no* action to impose section 232 restrictions on any imports of aluminum products from all sources.

²⁰⁹ See **Exhibit 8**, Source: US ITC DataWeb, available at <https://dataweb.usitc.gov/>. Data on this site have been compiled from tariff and trade data from the U.S. Department of Commerce and the U.S. International Trade Commission.

²¹⁰ See *Market Overview* available at <http://www.rusal.ru/en/press-center/press-releases/17314/>.

²¹¹ See <http://cmgroup.net/en/about>.

Nevertheless, should it ignore the law and the evidence and recommend instead that the President impose section 232 restrictions on aluminum in the name of “national security,” Commerce should establish a fair and transparent process to allow for the systematic exclusion of certain products from any such restrictions. Such an exclusion process should take account of various factors allowing parties to demonstrate that certain imported aluminum products either have no impact on national security, or that they otherwise substantially benefit the U.S. economy and downstream users. Many imports of various aluminum products are an integral element in providing significant economic benefits to the U.S. economy. This includes benefits to domestic producers and downstream customers/users, many of whom rely on imports for raw materials and/or for semi-finished products that are not produced domestically in sufficient quantities to satisfy total demand.

Permitting such exclusions would not only be beneficial to the U.S. economy, but it is also consistent with the underlying goal of the section 232 process, which is to provide remedies only for those specific imported products that “threaten to impair national security.” Allowing specific exclusions also comports with Secretary Ross’ statement during the recent section 232 steel investigation, where he stated it may not be necessary to impose restrictions on all products from all countries. The same consideration applies equally in this section 232 investigation for aluminum.

Therefore, for these reasons, Commerce should establish an open, transparent, and ongoing process to allow interested parties to demonstrate whether specific aluminum products from specific sources or specific countries should *not* be subject to any restrictions that may be imposed. Importantly, Commerce should encourage all interested parties (including producers, exporters, importers, end-users, *etc.*) to request such exclusions now as part of the formal pre-

hearing and post-hearing submission process, and later after it issues its report to the President. This will enable parties to request exclusions and provide supporting information even after any remedies may be imposed.

XI. COMMERCE SHOULD EXCLUDE ARMENIA AS A DEVELOPING COUNTRY

Armenia should be excluded from the scope of the present Section 232 investigation because it is a “developing country” beneficiary of the U.S. Generalized System of Preferences (“GSP”) and the volume of its imports of aluminum into the United States has been minimal. While the relevant national security regulations in the present context (*i.e.*, 15 C.F.R. § 705.4) do not specifically provide for the exclusion of developing countries from Section 232 investigations, the exclusion of Armenia under present circumstances is warranted not only based on a purely practical and objective assessment of the (non-existent) effect of imports from Armenia on the U.S. aluminum industry, but also from a trade policy perspective respectful of the United States’ commitments to developing countries.

The approach of the United States in the Section 201 steel safeguard matter in 2001-2002 is an instructive precedent in this context. Although safeguard actions under Section 201 are legally directed against all imports of the subject products from all countries, the President specifically excluded “developing countries” from the scope of the safeguard measures that were ultimately imposed. Specifically, the Section 201 case excluded shipments from “developing countries” accounting for less than 3 percent of U.S. imports of each of the subject products.²¹²

²¹² The Section 201 approach also looked to confirm that total imports from all developing countries together did not amount to more than 9 percent of total imports. The only developing countries exporting aluminum are South Africa, Brazil, India, Indonesia, Thailand and Armenia. South Africa and Brazil are the largest of these countries, but their total import share has remained low, never exceeding 2% of total imports, and most recently only averaging less than 1% of total imports. Thus, together, the percentage share of total aluminum imports from all of these developing countries is far below 9% of total imports. See US ITC DataWeb, available at <https://dataweb.usitc.gov/>; see also International Trade Centre (“ITC”) Market Analysis and Research, available at <http://www.trademap.org/>.

Because neither U.S. law nor the WTO rules defines what constitutes a “developing country,” the exclusion in the safeguard case was established by reference to the list of U.S. GSP beneficiary countries. In his Section 201 proclamation, the President specifically provided as follows: “For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries.”

The Section 201 approach of excluding developing countries is eminently reasonable and should be applied again in the context of this section 232 investigation of aluminum products. Imports of aluminum from Armenia should be excluded in the present case because Armenia is a U.S. GSP beneficiary country and its imports of aluminum into the United States accounted for less than 3 percent of U.S. imports in the relevant time period. Specifically, imports of all aluminum from Armenia in 2016 (the most recent full year for which data is available) totaled just \$19.5 million, which amounted to barely 0.11% of all aluminum imports during that time period.

Total aluminum imports from Armenia have remained as a very small percentage of all imports during each of the past six years, and they have even steadily decreased over time. As shown in the below chart, total imports from Armenia have never exceeded 0.53% of total imports (based on value) in any given year. Armenia’s average share of total imports during this entire six year period amounted to only 0.37%.²¹³

²¹³ See US ITC DataWeb, available at <https://dataweb.usitc.gov/>; see also International Trade Centre (“ITC”) Market Analysis and Research, available at <http://www.trademap.org/>.

Value (\$ millions)

Country	2011	2012	2013	2014	2015	2016	2017 (YTD)	total
Armenia	78.2	77.2	83.7	78.8	42.7	19.5	8.3	388.6
Total Imports	16,109	15,629	15,715	17,074	17,342	17,980	5,325	105,177
Armenia % of Total	0.49%	0.49%	0.53%	0.46%	0.25%	0.11%	0.15%	0.37%

Under these circumstances, imports of aluminum from Armenia cannot be found to threaten to impair national security, nor do they otherwise have any negative effect on the overall U.S. aluminum industry. Thus, excluding Armenia would not only be entirely consistent with the approach taken in the steel safeguard case, it would also be in keeping with the United States' commitments to developing countries.

XII. THIS INVESTIGATION AND ANY REMEDIES MUST COMPLY WITH ALL WTO REQUIREMENTS

As a Member of the World Trade Organization ("WTO"), the United States must ensure that the present Section 232 investigation, as well as the remedies that may ultimately be imposed, comply with the United States' WTO obligations. Absent such compliance, the conduct of the investigation and any remedies imposed thereunder may be subject to challenge under the dispute settlement rules of the WTO.

A. GATT Article XXI Narrowly Constrains the Use Trade Restrictions in the Name of "National Security"

The most relevant WTO provision in the context of an investigation on the effect of imports on national security is Article XXI of the General Agreement on Tariffs and Trade of 1994 ("GATT"). It provides an exception, for national security reasons, from the rules prohibiting restrictions on international trade. However, this exception is narrow in scope, allowing Members to impose only restrictions that are necessary for the protection of *essential*

security interests and limited to particular categories of goods and circumstances. Article XXI provides in relevant part as follows:

Nothing in this Agreement shall be construed...

(b) to prevent any contracting party from taking any action which it considers *necessary* for the protection of its *essential* security interests

- i. relating to *fissionable materials* or the materials from which they are derived;
- ii. relating to the traffic in arms, ammunition and *implements of war* and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- iii. taken in *time of war or other emergency* in international relations;...

(emphasis added)

Thus, not only must any restrictions in this context be necessary for the protection of essential security interests, they must also be limited to fissionable materials, implements of war, and times of war or other emergency, as the three criteria enunciated under Article XXI(b) make clear. These are objective criteria which WTO Members are not free to interpret and apply as they deem fit.²¹⁴ Reliance on these provisions by a WTO Member remains subject to review and challenge under the WTO rules.

While Article XXI has been considered in GATT panel reports predating the establishment of the WTO,²¹⁵ the key language of Article XXI(b) has not been interpreted by GATT or WTO Panels, or the Appellate Body. Nevertheless, as detailed further below, the plain text and context of Article XXI, as well as its object and purpose, confirm the narrow scope of

²¹⁴ See *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators*, WT/DS27/ARB/ECU (Mar. 24, 2000) (“*EC – Article 22.6 of the DSU*”) (finding that while references to the “party considers” in DSU Article 22.3(b) and (c) “leave[s] a certain margin of appreciation to the complaining party” with respect to the practicality and effectiveness of suspending concessions, the “margin of appreciation by the complaining party ... is subject to review by the arbitrators”).

²¹⁵ These reports provide little analysis or interpretation of the meaning and scope of the Article XXI exception, and were not adopted by the GATT Contracting Parties.

the exception it provides. Accordingly, the United States could not rely upon the Article XXI exception to impose broad restrictions on imports for largely commercial or economic reasons only peripherally related to national security.

B. WTO Article 3.2 and Other Interpretative Rules Confirm that the National Security Exception Is Narrow

Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) provides that a key function of the WTO dispute settlement system is “to clarify the existing provisions of [] agreements in accordance with customary rules of interpretation of public international law.” Accordingly, in interpreting and applying the principle of Article 3.2 to GATT and other WTO Agreements, the Appellate Body has relied on the Vienna Convention on the Law of Treaties (“Vienna Convention”), specifically its general rule of treaty interpretation under Article 31 and its supplemental means of interpretation under Article 32.²¹⁶ The basic principle under Article 31(1) is that a treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Applying this principle to Article XXI, under which a Member may only restrict international trade in violation of GATT obligations if it is “necessary” for the protection of “essential” security interests, the ordinary meaning of these two terms must be considered. “Necessary” is defined as “needed to be done, achieved, or present; essential.”²¹⁷ “Essential” is defined as “absolutely necessary; extremely important.”²¹⁸ The use of both of these somewhat redundant adjectives in the single phrase under Article XXI(b) clearly emphasizes the intent to

²¹⁶ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WTO Doc. WT/DS2/AB/R, at 16-17, 20, 23 (“*U.S. – Gasoline*”); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, Nov. 1, 1996, WTO Doc. WT/DS8, 10, 10/AB/R, at 10-15 (“*Japan – Alcoholic Beverages*”).

²¹⁷ *Necessary*, OXFORD DICTIONARY (last updated 2017) <https://en.oxforddictionaries.com/definition/necessary>.

²¹⁸ *Essential*, OXFORD DICTIONARY (last updated 2017) <https://en.oxforddictionaries.com/definition/essential>.

subject WTO Members' discretion in invoking Article XXI to a highly restrictive threshold. This is confirmed by the drafting history of Article XXI, which provides that the Contracting Parties included a provision that enabled Members to address genuine security interests, but expressly limited that exception "so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."²¹⁹

C. Any Restrictions Imposed under Section 232 Must be "Necessary" and "Essential" to National Security and Narrowly Tailored to Achieve Those Goals

The United States' own assessment of the extent to which the 232 investigation and any remedies that may be imposed as a result are "necessary" and "essential" to protect national security interests is thus subject to review under the rules of the WTO to consider whether the strict parameters of Article XXI(b) have been respected. The reference in the Article to taking any action a WTO Member itself "considers" necessary to protect its essential security interests does not imply that such Member has unlimited discretion to define those interests and take those actions it deems fit.²²⁰ On the contrary, in light of the object and purpose of the GATT and its limited exceptions, the word "considers" implies a careful balancing of a WTO Member's individual interests with those of the other Members its actions may affect.²²¹

²¹⁹ *Article XXI Security Exceptions*, GATT, ANALYTICAL INDEX – GUIDE TO WTO LAW AND PRACTICE 600 (6th ed. 1994) ("GATT ANALYTICAL INDEX"); Alan S. Alexandroff and Rajeev Sharma, *Chapter 35, The National Security Provision – GATT Article XXI*, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1571-1579 (2005).

²²⁰ *See* European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators, WT/DS27/ARB/ECU (Mar. 24, 2000) ("EC – Article 22.6 of the DSU") (finding that while references to the "party considers" in DSU Article 22.3(b) and (c) "leave[s] a certain margin of appreciation to the complaining party" with respect to the practicality and effectiveness of suspending concessions, the "margin of appreciation by the complaining party ... is subject to review by the arbitrators").

²²¹ Hannes L. Schloemann and Stegan Ohlhoff, "*Constitutionalization*" and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 443 (1999) ("Schloemann and Ohlhoff"), available at https://www.jstor.org/stable/2997999?seq=1#page_scan_tab_contents.

This is in keeping with the Appellate Body’s interpretation of other GATT exceptions, specifically under Article XX (as Article XXI has not yet been interpreted by the WTO dispute settlement body). In this context, the Appellate Body has held as follows:

... a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.²²²

Scholars have noted that “[o]n the same grounds, an interpretation of Article XXI ‘in light of [] object and purpose’ also requires a balanced approach.”²²³

Therefore, should the United States impose remedies as a result of its Section 232 investigation, it will have to ensure that these remedies (i) relate to one of the two strict criteria under Article XXI(b) relevant in the present case (i.e., relating to implements of war or times of war or other emergency), (ii) are necessary to protect essential security interests, and (iii) are proportionate to the identified effect of imports and balanced in relation to any other affected WTO Members’ rights. Given this high threshold, any remedies imposed by the United States for largely commercial or economic reasons only peripherally related to national security will most likely be challenged by affected WTO Members under the provisions of the DSU.

D. Quotas Are Impermissible in this Context

Moreover, with regard to specific remedies, any effort by the United States to impose a “quota” may run afoul of WTO provisions. Specifically, GATT Article XI:1 prohibits import

²²² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Nov. 6, 1998, WTO Doc. WT/DS58/AB/R, para. 157, reprinted in 38 I.L.M. 118 (1999) (hereinafter “*U.S. – Shrimp*”).

²²³ Schloemann and Ohlhoff, at 439.

restrictions made effective through quotas, among certain other measures. None of the limited exceptions to this principle under Article XI:2 (*i.e.*, temporary export restrictions on essential products, import or export restrictions necessary for the application of standards, or import restrictions on agricultural or fisheries products) would apply in the context of the Section 232 investigation on the effect of aluminum imports into the United States. Therefore, should the United States make an affirmative finding in this case and impose relief, any such relief must not take the form of a quota.

CONCLUSION

Thus, for these reasons, the Department should determine that aluminum imports do not threaten to impair national security. The Department should, therefore, recommend against any form of relief.

List of Exhibits

- Exhibit 1* “US primary aluminium supply: Competitive conditions affecting the US aluminium industry, Executive Summary (April 2017) (“CRU I”)
- Exhibit 2* “US primary aluminium supply: Competitive conditions affecting the US aluminium industry” (18 April 2017) (“CRU II”)
- Exhibit 3 Aluminum Industry Association: Production and Processing
- Exhibit 4 Harbor Aluminum Special Alert: Is high purity aluminum a national security concern for the US? (Apr. 27, 2017)
- Exhibit 5 International Designations and Chemical Composition Limits for Unalloyed Aluminum (Mar. 2007)
- Exhibit 6 Bloomberg News, U.S. Has Obscure Tech Aluminum Into Military-Grade Metal (June 7, 2017)
- Exhibit 7 Special Analysis (Part II): Are Aluminum Imports a Threat to US National Security?, by Harbor Vice President for Market Intelligence and Consulting (Apr. 28, 2017)
- Exhibit 8 Imports of Semi-finished Products for Certain Categories
- Exhibit 9 Total Imports of Semi-finished products
- Exhibit 10 Excerpt of U.S. Department of Defense: Projected Defense Purchases - Detail by Industry and State (Nov. 2013)
- Exhibit 11 US Geological Service: Mineral Commodity Summaries 2017
- Exhibit 12 Excerpt of U.S. Department of Defense: Projected Defense Purchases - Detail by Industry and State (August 2003)
- Exhibit 13 Share of Imports by Value
- Exhibit 14 2016 Total Imports of Aluminum by Country
- Exhibit 15 2016 Share of Aluminum Foil Imports
- Exhibit 16 US Aluminum Manufacturers’ Profitability Summary
- Exhibit 17* IBIS World report: Aluminum Manufacturing in the US
- Exhibit 18 Rusal Submission to the ITC
- Exhibit 19 Excerpt of The Impact of EU Policies on the Competitiveness of the EU Aluminium Industry” A Focus on Non-Integrated Downstream Users; Libera

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- Exhibit 20 Chinese Government Subsidies for Aluminum Extrusions
- Exhibit 21 Ranking of Aluminum Exports by Country
- Exhibit 22 The Economic Impact of Aluminum
- Exhibit 23 AMM: Power Rates drive U.S. Aluminum Industry’s future (March 31, 2016)
- Exhibit 24* CRU report - Aluminum Monitor 2017
- Exhibit 25* CRU report - Imports to the U.S. of HS 76 in 2014-2016
- Exhibit 26* CRU report - Global Outlook for Aluminum Foil to 2022
- Exhibit 27 Aluminum Country: Impact on U.S. Manufacturing
- Exhibit 28 Imports of Aluminum from China from 1996 to Present

* Confidential Exhibit